84-1484

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ALEXANDER L. STEVAS
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Are Wisconsin Statutes constitutionally invalid under the Supremacy Clause and the preemption rules of the National Labor Relations Act ("NLRA"), 29 U.S.C. sec. 151 et seq., in forbidding the state from purchasing any product manufactured or sold by recidivist violators of th NLRA?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. Two of the state officials are described in their official capacity, not by name. See Rule 40.4 of this Court. The Secretary of the Department of Industry, Labor, and Human Relations named below has resigned and has been succeeded by Howard S. Bellman. See Rule 40.3 of this Court.

The three state agency appellants are here sub nomine only, as they were dismissed below. See court of appeals decision at n. 1.

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REPORTED DECISIONS

The court of appeals' decision is reported as Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608 (7th Cir. 1984). The district court's decision is reported as Gould v. Wis. Dept. of Industry, Labor & H. Rel., 576 F. Supp. 1290 (W.D. Wis. 1983).

JURISDICTIONAL GROUNDS

Appellee sought declaratory and injunctive relief against Wisconsin statutes on the ground of their unconstitutionality. It posited district court jurisdiction under 28 U.S.C. secs. 1331 and 1343(3). The district court declared the statutes unconstitutional as repugnant to the Supremacy Clause and the preemption principles of the NLRA. Appellants appealed to the Court of Appeals for the Seventh Circuit, invoking

its jurisdiction under 28 U.S.C. sec. 1291.

The court of appeals entered its judgment on December 13, 1984. Notice of appeal was filed February 18, 1985, in the Court of Appeals for the Seventh Circuit. It affirmed the district court's conclusion that the state statutes are repugnant to the Constitution. This Court has jurisdiction under 28 U.S.C. sec. 1254(2).

STATUTES INVOLVED

The statutes declared unconstitutional are Wis. Stats. secs. 16.75(8) and 101.245 (1981) as created by chapter 340, Wis. Laws of 1979, effective May 21, 1980, as follows:

. . . .

> SECTION 2. 16.75 (8) of the statutes is created to read:

16.75 (8) The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245.

SECTION 3. 101.245 of the statutes is created to read:

101.245 Labor law violators. (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, 29 USC 151 et. seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

(2) This list may be compiled from the records of the national labor relations board.

(3) Whenever a new name is added to this list the department shall send the name to the department of administration for action as provided in s. 16.75(8).

(4) A name shall remain on the list for 3 years.

(5) If any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (1) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should

remove the person's or firm's name from the list.

. . . .

STATEMENT OF THE CASE

Appellee is a Delaware corporation principally doing business in Illinois. It has twenty separate divisions. During a five year period, the court of appeals affirmed and/or enforced findings of the National Labor Relations Board (NLRB) of four distinct violations of the NLRA. These proceedings were against appellee regardless of the division involved. See Gould, Inc., 216 NLRB 1031 (1975), enf'd in part, ____F.2d ____, 1977 Lab. Cases (CCH) para. 11, 953 (6th Cir. 1976); Gould Inc., 221 NLRB 899 (1974), enf'd 550 F.2d 1060 (6th Cir. 1977); Gould Inc., 237 NLRB 66 (1978), enf'd 610

F.2d 316 (5th Cir. 1980); Gould Inc., 238 NLRB 618 (1978), enf'd 638 F.2d 159 (10th Cir. 1980).

At the material times appellee's divisions were doing business with the state in amounts in excess of $10,000. One division had outstanding bids in that amount to provide goods and services to the state. On August 25, 1982, pursuant to the state statutes, appellants debarred appellee for three years from doing business with the state, and advised they would cancel existing contracts if that could be done without penalty.

Appellee commenced this action in February 1983 alleging NLRA preemption and a violation of equal protection and due process. On February 18, 1983, the district court granted preliminary injunctive relief. The parties filed

cross motions for summary judgment. On January 23, 1984, the district court declared the Wisconsin statutes unconstitutional as preempted by the NLRA, and permanently enjoined the individual appellants from debarring plaintiff under those statutes, refusing to purchase its goods, or including it on the labor law violators list. The district court subsequently awarded attorney's fees to appellee under 42 U.S.C. sec. 1988. The court of appeals affirmed the declaration of the statutes' unconstitutionality on supremacy and preemption grounds but not on equal protection or due process grounds, and reversed the judgment awarding attorney's fees.

PLENARY CONSIDERATION IS WARRANTED

This case presents a substantial federal question and requires plenary

consideration, with briefs on the merits and oral argument.

A. The decision impairs the sovereign right to choose a trading partner

Wisconsin chooses not to do business with recidivist labor law violators. The court of appeals held Wisconsin's choice offends the remedial scheme of the NLRA.

What the court missed is that states have a sovereign right to choose with whom they will deal. A state has the "sovereign right to decide how, with whom, and for whose benefit to deal." Reeves, Inc. v. Stake, 447 U.S. 429, 438 n. 10 (1980). This right is the same as the long-recognized prerogative of the "'trader or manufacturer ... to exercise his own independent discretion as to parties with whom he will deal.'" Id. at 438-39

The Commerce Clause does not restrain the choice of a trading partner. When discharging "'proprietary functions' [the states] are exempt from Commerce Clause scrutiny." Id. at 437 n. 9. For the Commerce Clause was directed at the "'regulatory and taxing actions'" of the states. Id. at 436-37. See White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 103 S. Ct. 1042, 1046 (1983) (when the states act as a market participant, the Commerce Clause establishes no barrier). As market participants, the states can even favor their own citizens over others, for "[n]othing in the purposes animating the Commerce Clause" forbids that choice "in the absence of congressional action." Hughes v. Alexandria Scrap, 426 U.S. 794, 810 (1976).

A consequence is that conflict is impossible between a state's act as a market participant and federal regulation. "When the State acts solely as a market participant no conflict between State regulation [emphasis the Court's] and federal regulatory authortity can [emphasis added] arise." United Bldg. & Const. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984).

Thus, Wisconsin enjoys the same prerogative of any trader, be it General Motors or a local druggist, to elect not to deal with law violators, be they organized crime, tax delinquents, or NLRA recidivists. For no congressional act forbids that choice by a market participant.

The court of appeals rejected this analysis for basically three reasons.

First, the court held that these

market participant cases relate only to the dormant commerce clause, whereas in the NLRA "Congress has legislated decisively in the area." Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608, 613 (7th Cir. 1984). But Congress has not legislated in the area of market participant choices. General Motors can elect not to deal with labor law recidivists without offending the NLRA, for the NLRA governs General Motors' relations with its employes, not its trading partners. Wisconsin, as a matter of its sovereignty, enjoys the same privilege.

Second, the court held Wisconsin is not acting as a market participant because its purpose is to induce compliance with the NLRA, not to efficiently spend its funds. Id. at 614. But the right to choose one's

trading partners has not been conditioned on acting from motives likely to meet a judicially approved economic policy. Matters of social and economic policy are well within the traditional sovereign powers of the states, see National League of Cities v. Usery, 426 U.S. 833 (1976), so much so that a state might make economically imprudent choices to promote social objectives, such as affirmative action, aids to the handicapped, safety, etc. In this case, Wisconsin could choose not to deal with recidivist labor law violators simply out of a policy disgust at the idea of permitting them to use money at its expense, without aiming to be a helpful gadfly to the NLRB. These choices are inherent within the prerogatives of a free market participant, particularly if the participant is a sovereign state.

Third, the court said Wisconsin had imposed a penalty on Gould that intruded on the remedial scheme of the NLRA. Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d at 612 n. 4 and n. 7 and 614. But that begs the question whether Wisconsin's decision was that of a market participant. If it was, Wisconsin imposes no more of a preempted "penalty" on appellee than does any other entrepreneur declining to trade with it.

Wisconsin, then, has made the choice of a market participant, a "simple unilateral refusal to deal" that is immune from the dormant commerce clause. See White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 103 S. Ct. 1032, 1050 (1983) (Blackmun, J., dissenting). Nowhere does the NLRA seek to affect that decision. Nowhere has Congress "unmistakably

ordained," Hayfield Northern R. v. Chicago and N.W. Transp., 104 S. Ct. 2610, 2617 (1984), that the states should be divested of this measure of their sovereignty.

This case is not even close to what has concerned this Court over the years in fashioning an NLRA preemption rule. Wisconsin does not adjudicate whether an employer has violated the NLRA. It does not provide a forum or a remedy for the aggrieved employe. It does not order others to cease business with recidivists. It simply chooses not to do business with them as a matter of social policy. Appellee's business opportunities with Wisconsin are peripheral to any NLRA interest, at best, and at the least a finding of preemption requires an unequivocal decision from Congress foreclosing to the private

market and the states the right to choose a trading partner. See Sears, Roebuck & Co. v. Carpenters, 430 U.S. 180 (1978); Farmer v. Carpenters, 430 U.S. 290 (1977); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959) (Congress' intent to preempt must be compellingly clear in matters of peripheral concern to the NLRA or if the interests are deeply rooted in local feeling and responsibility).

B. The circuits are in conflict

No other decided case is on all fours. But see J.P. Stevens & Co. v. Jackson, 85 Lab. Cas. (CCH) Para. 10,980 (N.D. Ga. 1978) (rejecting challenge to mayoral decision not to do business with a company until its discriminatory and illegal practices ceased, with virtually no discussion of the NLRA); Ohio Inns,

Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976), cert. denied, 430 U.S. 946 (1977), (rejecting due process and equal protection challenges to state termination of vendor's contract for failure to recognize unions as required by NLRA). Nevertheless, the decision cannot be squared with other cases conditioning state spending power in NLRA contexts.

In Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3rd Cir. 1977) (en banc), New Jersey was permitted to threaten withdrawal of transportation subsidies if the employer agreed with the union to pay a cost of living adjustment (COLA), despite the NLRA rule that the terms of contracts are to be left to free market forces, because (a) the state was exercising its presumed prerogatives as a private consumer to

pressure cost reductions, and (b) the NLRA specifically exempts states as employers subject to NLRB jurisdiction. Thus, Wisconsin could refuse to deal with appellee if it agreed to a COLA clause with its employes' union, even though the NLRA protects the right to agree to such a clause. It should follow that Wisconsin can refuse to deal with appellee as an NLRA recidivist violator, even if the NLRB has imposed a remedial sanction.

The court below said that does not follow, however, because Wisconsin is intruding on the NLRA remedial scheme, not functioning as a private purchaser of services to hold down costs for some permissible governmental purpose such as providing transportation services. Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d at 613-14. But

the conclusion assumes the premise, unsupported by any authority, that a state's interest as market participant is confined to choices of economic value to subserve police power enactments. The ordinary private consumer does not have police powers. Further, the conclusion is not responsive to Byrne's holding that Congress expressly exempted states from the NLRA and that states are presumed free to make choices as a market participant, absent a compellingly clear contrary congressional directive.

In Image Carrier Corp. v. Beame, 567 F.2d 1197, 1202-03 (2nd Cir. 1977), the court upheld a city resolution to deal only with unionized printers because (a) no evidence showed actual interference with an employe's right to join or not join a union and (b) it is permissible for a city to encourage union shops. It

should follow that Wisconsin can choose, as a matter of social policy, not to trade with NLRA recidivists.

The court below distinguished Beame, however, on the ground that Wisconsin is regulating employers for conduct covered by the NLRA. Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d at 613. There are two flaws in this conclusion.

First, it assumes that states have less rights as market participants than private entrepreneurs do. That is error; the states have the same right. See Reeves, Inc. v. Stake, 447 U.S. 429, 438-39 (1980). Had General Motors made the same decision as Wisconsin has made, appellee would not be heard to argue that General Motors was "regulating" its NLRA conduct. Nor should it be heard to say Wisconsin is doing so, notwithstanding

the loss of a trading partner is an additional cost resulting from its recidivism.

Second, the conclusion misses the significance of this Court's holding that, when a state acts as a market participant, conflict is impossible between the state's act and federal regulation. United Bldg. & Const. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984). If Wisconsin, as a market regulator, had required others to cease business with appellee because of its recidivism, conflict with the NLRA remedial scheme would be possible. But when Wisconsin, as a market participant, chooses for itself not to trade with recidivists, conflict with the NLRA is impossible.

CONCLUSION

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal and that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

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APPENDIX ACCOMPANYING JURISDICTIONAL STATEMENT

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In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 84-1115 and 84-2075

Gould, Inc.,

Plaintiff-Appellee,

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Defendants-Appellants,

Appeal from the United States District Court for the Western District of Wisconsin. No. 83 C 104 - **Barbara B. Crabb**, Chief Judge

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ARGUED SEPTEMBER 17, 1984 -
DECIDED DECEMBER 13, 1984

Before CUMMINGS, Chief Judge, WOOD, Circuit Judge, and FAIRCHILD, Senior Circuit Judge.

CUMMINGS, Chief Judge. GOULD, Inc., ("Gould") filed suit in the Western District of Wisconsin challenging the constitutionality of Wis. Stat. §§ 16.75(8), 101.245 (1981), which blacklist labor law violators. Both parties filed motions for summary judgment. The district court granted Gould's summary judgment motion, holding that the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the "NLRA"), preempted the state statutes. In a later hearing, the district court awarded Gould attorneys' fees under 42 U.S.C. § 1988. The individual defendants appeal both decisions of the district court. 1/ We

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1/ Gould filed suit against three Wisconsin state agencies and seven individual Wisconsin state officers and (Footnote continued)

affirm the lower court's grant of summary judgment but reverse as to attorneys' fees.

I

No genuine issues of material fact are in controversy. The parties dispute only the district court's legal conclusions set out in the opinion below, Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations, 576 F. Supp. 1290 (W.D. Wis. 1983). Section 101.245 of the Wisconsin Statutes provides:

> (1) The [Department of Industry, Labor and Human Relations]

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employees. The district court dismissed the three defendant state agencies as immune from action under the Eleventh Amendment. That ruling is not at issue.

shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period * * *, if the final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, * * * and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period * * * if the 3 contempt findings involved a cumulative total of at least 3 different violations.

* * * * *

(4)A name shall remain on the list for 3 years.[2/] Wis. Stat. §101.245 (1981).

This list is known as the labor law violators' list. The real bite in the

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2/ This Section also provides:

> (5) if any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (1) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should remove the person's or firm's name from the list.

legislation appears in Section 16.75(8), which provides:

> The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245.

Wis. Stat. § 16.75(8) (1981).

Gould is a Delaware corporation with its principal place of business in Illinois. In August, 1982, two of its divisions had contracts to provide goods and services to Wisconsin in amounts in excess of $10,000 and expected to continue to bid on and be awarded contracts to provide goods and services

exceeding $10,000. Wisconsin's Department of Industry, Labor and Human Relations placed Gould on the labor law violators' list in August 1982, thus under Section 101.245(4) barring Wisconsin from doing business with Gould for three years, until July 1, 1985. Defendant John Driscoll, on behalf of the Wisconsin Department of Administration, advised Gould that its existing contracts would be cancelled as soon as that could be done without penalty. The predicate for these actions was the enforcement of three separate National Labor Relations Board ("NLRB") decisions against various Gould divisions during the preceding five years. Gould no longer owned any of these divisions at the time of being placed on the labor law violators' list, and none of the cited divisions were located in Wisconsin. Gould claims that

the two Wisconsin statutes violate the Supremacy Clause, Art. VI, of the Constitution, as well as the due process and equal protection clauses of the Fourteenth Amendment. The district court did not address the Fourteenth Amendment claims due to its disposition of the case on grounds of preemption. The court did, however, hold that Gould's Fourteenth Amendment claims were "sufficiently substantial to support federal jurisdiction and would justify an award of attorneys' fees, even though plaintiffs prevailed on another claim [preemption]," citing Mahar v. Gagne, 448 U.S. 122. (Order of May 25, 1984.) We have jurisdiction pursuant of 28 U.S.C. § 1291.

II

The difficulty in labor law preemption analysis is that "the aims and

social policy" Congress was implementing "were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 240. Nonetheless, synthesis of the numerous decisions is possible. Garmon directs us to determine whether the activity the state would regulate is protected or prohibited by Sections 7 or 8 of the NLRA, or arguably so protected or prohibited. Id. at 244-245. When Section 7 or 8 clearly covers the conduct in question, then the NLRA preempts any state action, because to "leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." Id. at 244.

Exceptions to this general rule do exist. Courts must make "a balanced inquiry into such factors as the nature of federal and state interests in regulation and the potential for interference with federal regulation." Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 300. State interests that are "a merely peripheral concern" of federal labor law override the federal interest. Garmon, 359 U.S. at 243. Alternatively, state regulation may escape preemption by being directed at state "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Id. at 244. Examples of this type of permissible state regulation

include permitting suits in state court for intentional infliction of emotional distress, Farmer, supra; for malicious libel, Linn v. United Plant Guard Workers, 383 U.S. 53; and for mass picketing and threats of violence, Automobile Workers v. Russell, 356 U.S. 634.[3/]

3/ Some activity is neither protected nor prohibited by the NLRA, nor even arguably so. In such cases the court must determine whether Congress intended to leave the activity at issue to the free play of economic forces, or whether states may regulate it. See Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132; Local 20, Teamsters, Chauffeurs and Helpers Unions v. Morton, 377 U.S. 252. Once again, a balancing process similar to that described above is required. See New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 527-528, 530-533 (plurality opinion).
(Footnote continued)

The defendants would circumvent this analysis by arguing that, because the

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The Ninth Circuit applied this balancing analysis in this situation in golden State Transit Corp v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982), certiorari denied, 459 U.S. 1105. The court of appeals vacated the district court's grant of a preliminary injunction prohibiting Los Angeles from allowing plaintiff's taxicab franchise to expire. One effect of the city's denial of the taxicab franchise renewal was to alter the balance of power in a collective bargaining dispute in favor of the union. Id. at 759. The question before the court was whether Congress had preempted the city's ability to allow the franchise to expire during labor negotiations as a regulation of conduct meant to be left to the free play of economic forces. Because the city's action involved the use of streets and (Footnote continued)

Wisconsin legislation seeks to promote compliance with the NLRA and does not

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highways, a traditionally local matter, and because Congress had exhibited no intent to interfere with the city's granting franchises to whom it pleased, the city's action was allowed. The effect on the national labor regulatory scheme was slight enough that state regulation was permissible. The instant situtation differs in its being directed expressly at violations of the NLRA, and its concomitantly greater impact on national labor law. Gould's attempted reliance on Golden State is therefore misplaced.

penalize conduct that the NLRA would protect, federal interest are not harmed. The defendants also contend that Wisconsin has a deeply rooted interest in compliance with the labor laws, so that its decision not to purchase goods and services from labor law violators should prevail over any possible impingement on the federal regulatory structure. We recognize that Wisconsin's decision to refuse all financial support and reward to those who repeatedly violate national laws reflects a laudable purpose of substantial importance to the people of Wisconsin. But we must balance Wisconsin's interest against the federal interests at stake and the statute's potential for interference with the federal regulatory scheme. Doing so demonstrates that the Wisconsin statutes are preempted.

The problem with the defendants' arguments is that it ignores that the NLRA is designed to be a remedial, not a punitive statute. Once an employer or union rectifies its unlawful conduct and makes those harmed whole, for example by reinstating a wrongfully-discharged employee with back pay, federal sanctions cease. Basing a boycott on federal labor law violations, regardless of where the violations occurred and whether they have been rectified, clearly interferes with the federal scheme. 4/

4/ The defendants argue that if the statutes are not preempted, then they are not punitive. Such reasoning inverts the true logic. If the statutes impose no penalty, then they most probably are not preempted, and not the other way around. Our objection to the statutes is that they do impose a penalty.

The problem can be stated in another way. The Wisconsin Legislation seeks to prohibit activity also prohibited by the NLRA. Garmon, supra, teaches that state regulation of both activity protected and prohibited by the NLRA is preempted. Defendants would limit Garmon and its progeny to those situations in which a state is attempting to prohibit activity protected by the NLRA. Nonetheless, the cases will not withstand such factual distinctions. The Court clearly stated in Garmon that its rule applied without distinction to a state's attempt to regulate either protected or prohibited activity. The majority emphasized that they necessarily were "concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of

substantive law and differing remedial schemes." Garmon, 359 U.S. at 242. Indeed the NLRA was enacted to remedy the varying attitudes of the states toward labor law. Garner v. Teamsters Union, 346 U.S. 485, 490.[5/] The defendants

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5/ Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, highlights the importance of maintaining the balance Congress has set against possible infringement by the states. In that decision, the Supreme Court, although concluding that the union's activities (Footnote continued)

cannot argue that the Wisconsin statutes are saved from any such conflict between

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had been illegal, nevertheless held that those activities could not be subjected to a state's antitrust laws since the state laws could not be assumed to acord with federal labor policies. On the other hand, federal antitrust laws could be assumed to be carefully tailored in order to accomodate national labor policies, so that union activity could be subjected to them. Id. at 636-637. Thus Connell teaches that courts must examine with care state legislation directly affecting either side in a labor law dispute before upholding such statutes.

remedial schemes by their addressing the problem of recidivism instead of specific instances of labor law violations[6/] While recidivism is conduct that the NLRA has chosen not to prohibit directly, Congress' failure to do so does not

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6/ Admittedly, the Wisconsin scheme does not require a court to examine whether specific conduct was violatory of the NLRA. A court need only determine whether the company incurred the requisite number of labor law violations that were enforced by a federal court, regardless of whether the violations have been remedied. This configuration in fact makes the statute appear more, not less, like a penalty. In light of the entire Wisconsin statutory scheme, the statute's concerning itself with recidivism alone is not determinative.

necessarily imply that the remedy is thereby left to the states.[7/]

7/ In fact Congress has authorized the NLRB to deal with recidivism when the NLRB deems it appropriate. Accordingly, 29 C.F.R. § 101.13(b) (1983) provides that "[d]espite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases, it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree." Doing so alleviates the necessity of obtaining an enforcement decree later when violations occur and so allows the Board to act more quickly should an organization in initial compliance with an order subsequently violate it. Presumably the Board would initiate such action only against companies with bad track records on compliance, for the language of the regulation-allowing NLRB initiation of enforcement proceedings "in some cases"-implies that Congress intended the NLRB to penalize recidivism only in rare instances. Allowing the states indiscriminate punishment of recidivism impermissibly intrudes on the federal scheme of regulation.

The possibility of other states, adopting Wisconsin's general scheme supports our holding of preemption. The spectre of different states, imposing boycotts for various lengths of time, based on various numbers and types of NLRA violations, is sufficiently real to decline to uphold the Wisconsin legislation. Doing otherwise would reintroduce the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies," Garner, 346 U.S. at 490, that the NLRA sought to prohibit.

The defendants argue that Wisconsin is acting as a market-participant, not as a market-regulator, so that the foregoing analysis is inapposite. The argument is unpersuasive. The major cases on which they rely- Hughes v. Alexandria Scrap Corp., 426 U.S. 794; Reeves, Inc. v.

Stake, 447 U.S. 429; White v. Massachusetts Council of Construction Employers, 460 U.S. 204,-are not controlling. Each of these is a dormant Commerce Clause case, dealing with the range of state regulation activity permissible in areas where Congress has failed to act. They do not address the issue before us, the range of state regulation allowable when Congress has legislated decisively in the area.

The cases defendants cite that do consider NLRA preemption of state action are distinguishable too. Image Carrier Corp. v. Beame, 567 F.2d 1197 (2d Cir. 1977), certiorari denied, 440 U.S. 979, involved a New York City Resolution "requiring bidders for flat-form work to operate a union plant." Id. at 1199. Insofar as it based its identification of those companies from whom it would entertain bids on labor policies, the

Resolution parallels the statutes at issue in this case. But the analogue breaks down in that New York City was not imposing any penalty for failure to comply with the NLRA, nor was it requiring that an employee join a union despite Section 7's protection of a person's refusal to join. Id. at 1202. As such, New York was assessing no penalty for noncompliance with the NLRA. The issue for the Second Circuit then became whether the NLRA preempted the municipal Resolution because it was adverse to the NLRA rather than because it promoted the NLRA's objectives more vigorously than Congress would sanction. Because the court found no evidence to indicate that the Resolution had "even an indirect coercive effect on nonunion employees" and so in no way "alter[ed] the collective bargaining relationship within nonunion shops, there

[was] no need to determine whether Congress intended that federal labor law preempt those local practices which do alter collective bargaining relationships." Id.[8/] In other words,

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8/ In J.P. Stevens & Co. v. Jackson, 85 Lab. Cas. (CCH) 10,980 (N.D. Ga. 1978), the district court relied on Image Carrier. The case involved the mayor of Atlanta's decision to bar city contractors from purchasing goods or services from J.P. Stevens or any other (Footnote continued)

the Resolution did not regulate employees' conduct. Defendants suggest that the Wisconsin statutes have no coercive effect because they seek to influence conduct, not to regulate it. Nevertheless the breadth of the Wisconsin

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company with whom J.P. Stevens was a first-tier contractor "until and unless the J.P. Stevens Company and such of those companies with whom they do contract cease and desist from such discriminatory and illegal practices." Executive Order 77-10, quoted in id. at 19,781 (emphasis in original). Nonetheless, the court did not raise or discuss the labor preemption issue. Its failure to do so renders the opinion inapposite here. To the extent that the district court relied on Immage Carrier, (Footnote continued)

laws--a company's being prohibited from doing any business at all with the state for a period of three years--necessarily means that their imposition against a company imposes a much harsher sanction

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it did so for its due process analysis, not its preemption analysis.

The court also treated the mayor's decree as imposing only a condition precedent to J.P. Stevens' contracting with the city. Unlike the Wisconsin legislation, Mayor Jackson's Executive Order would cease to operate once J.P. Stevens came into compliance with federal labor law. It was not an unconditional three-year bar to doing business with Atlanta. This difference justified the district court's agreeing with the mayor that "he did not preclude plaintiff from contracting with the city, he merely inserted a reasonable condition precedent to such contracting." Id. at 19,782 (footnote omitted). See also id. at 19,784 (district court's acceptance of mayor's contention).

than Congress intended. The Wisconsin laws then are more than a policy statement; they actually regulate employers' conduct.[9/]

Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025 (3d Cir. 1977) (en banc), dealt with New Jersey's statement, during collective bargaining between privately owned transit companies

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9/ Indeed the Wisconsin legislature enacted the laws because it believed they would do so. The possibility of a three-year boycott by the state of Wisconsin imposes overmuch on the NLRA.

and labor unions, that the state would not continue to subsidize the operations of any company that agreed to an uncapped cost of living clause in its labor agreement. The Third Circuit stressed that "it is important to consider that New Jersey's interest is that of insuring that 'essential' transportation services are provided to the public, rather than regulating labor relations per se." Id. at 1030. This consideration is what distinguishes that case from the one before us. New Jersey's purpose in acting as it did was to conserve its scarce financial resources and ensure that it was purchasing the least expensive goods available on the market. The state was not, as is Wisconsin, attempting to regulate private companies' labor practices. Nor was it forbidding their operation in the state, though admittedly any company that

accepted an unlimited cost of living clause would have to forego receiving state subsidies. Wisconsin, on the other hand, does not suggest that its action is necessary to conserve public resources; the state merely wants to condition any contract award on the bidder's track record of compliance with the NLRA. Wisconsin's doing so significantly interferes with the mechanisms the NLRA has established for encouraging compliance so that they preempt the Wisconsin legislation.

Amalgamated Transit Union differs from this case in a second respect. New Jersey chose to subsidize private companies only because it believed that doing so benefited the public. The state could have decided at any time that doing so was no longer an efficient use of funds and repealed its legislation authorizing that allocation of money.

The situation before us is quite different. Absent a few narrow exceptions,[10/] contract bidders in Wisconsin have a right to expect that the company submitting the lowest bid will win the contract. Wis. Stat. § 16.75 (1981). This expectation differs from the hope of a private company that the state will continue to fund its activities. Wisconsin, unlike New Jersey, simply is not functioning as a private purchaser of services. The question is the rationale underlying

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10/ Among others, these include the consideration of life cycle costs such as energy efficiency, writing specifications to permit whenever possible the purchase of materials manufactured in the United States, and purchasing patented or proprietary articles. See Wis. Stats § 16.75 (1981). These exceptions reflect no intent to affect the national labor policy and so are not preempted.

Wisconsin's law. When the policy the law promotes is not efficient use of state funds but the intent to effect compliance with the NLRA, the regulation is preempted by the NLRA's establishment of a comprehensive regulatory scheme meant to preclude state action.[11/]

11/ That a statute may escape preemption because it is a general law not aiming to regulate conduct subject to Sections 7 or 8 of the NLRA or affect the bargaining relationships between employers and employees underscores the difficulties inherent in the defendants' arguments. See New York Tel. Co. v. New York Labor Dept., 440 U.S. at 529, 533 (plurality opinion) (pointing out that no attempt to affect the relationships governed by the NLRA was at stake). The constant reiteration in the caselaw of the reminder in Garmon that even laws of general application, as well as "laws directed towards the governance of industrial relations," 359 U.S. at 244, (Footnote Continued)

We rest our holding on the penalty that Wisconsin has imposed on recidivist labor law violators. The Wisconsin

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may be preempted supports a negative inference that laws directed specifically at labor relations, such as the Wisconsin legislation before us, should be regarded with great suspicion. See, e.g., New York Tel., 440 U.S. at 533 ("our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity").

legislation does not impermissibly burden Gould's federal appeals rights. What is impermissible is its punishment of recidivism, not its defining the companies affected in terms of number of court enforcements of NLRB orders. The possibility of incurring harsher sanctions because of an appeal is not an unheard of event in our system of law. For instance, the Supreme Court held in Chaffin v. Stynchcombe, 412 U.S. 17, that the possibility of a higher sentence on retrial did not chill the petitioner's appeal rights. In re Sewell, 690 F.2d 403 (4th Cir. 1982), and Nash v. Florida Industrial Commission, 389 U.S. 235, are not to the contrary. Nash involved Florida's denial of unemployment benefits to those who file unfair labor practice charges, and so involved direct state regulation of conduct protected by the NLRA rather than the problem of a state

penalizing conduct also penalized by the NLRA. Sewell in fact supports our decision. It involved a union's state law claim against a company president for tortious interference with a contractual relationship. The president had refused to recognize the union in order to challenge its certification by the NLRB. The NLRB found the president's conduct violative of the NLRA. Nonetheless, the state court refused to allow the state law claim, remarking that "[s]tate law which is invoked to redress conduct prohibited by § 8 of the Act falls squarely within Garmon's doctrine of preemption." Sewell, 690 F.2d at 408.[12/] The state law was preempted in

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12/ Accord Carter v. Sheet Metal Workers' Int'l Ass'n, 724 F.2d 1472 (11th Cir. 1984).

that case because it imposed a penalty on the employer that was in addition to the one imposed by the NLRA, not because it infringed on the employer's appeal rights. Sewell supports our result and reasoning.

That the initiative to appeal is not always in the hands of the private company buttresses the distinction made here. The NLRB may enforce some of its orders "notwithstanding compliance" by the company charged. 29 C.F.R. § 101.13(b).[13/] Consequently the NLRB itself may in some instances initiate an enforcement proceeding -- even if a private company would seek to avoid such a proceeding by complying with the order at issue.[14/] A private party's inability to control in every instance whether an enforcement order will be sought means that the Wisconsin statutes do not measurably affect a party's appeal

right. This is especially so since the number of appeals is not really being restricted at all. As long as a party's position has merit, then it most probably will prevail on appeal.[15/] The number of

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13/ See supra n. 7.

14/ The mechanism for doing so is detailed in 29 C.F.R § 101.14: "If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement."

15/ Gould argues that the Wisconsin legislation inhibits and employer's engaging in "gray area" activities out of the fear of incurring an NLRB violation, thereby circumventing the NLRB's determination of which such activities are permissible under the NLRA, and thus affecting the NLRB's ability to determine and develop national labor policy. To support its claim, Gould points to two instances in which it appealed NLRB orders to determine whether certain novel practices violated the NLRA, Gould Inc., 238 NLRB 618 (1978), enforced, 638 F.2d 159 (10th Cir. 1980); Gould Inc., 221 NLRB 899 (1975), enforced, 550 F.2d 1060 (7th Cir. 1977). This argument does not hold water. Even were Gould and other (Footnote continued)

violations is irrelevant to the Wisconsin statutory scheme; only the number of enforced orders is considered. But

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companies doing business with Wisconsin to be discouraged from engaging in certain activities, other companies would most probably do so, thereby affording to the NLRB the opportunity to determine their legality.

Any claim of "chilling" is speculative at best. The enforcement orders on which Gould's "disbarment" occurred were entered prior to the effective date of the state legislation, so that the Wisconsin laws could not possibly have had any effect on Gould's decision whether to appeal. Gould has pointed to no actual instances of chilling and yet contends that the Wisconsin laws would operate to restrict its appeal rights. We find that contention without basis and reject it for the reasons stated.

because the Wisconsin legislation does furnish a state remedy at variance with the federal statutory scheme, we hold that the Supremacy Clause preempts the statutes at bar.

III

Gould argues that the alleged restriction on its appeal rights imposed by the Wisconsin legislation justifies the district court's award of attorneys' fees based on Gould's preemption claim alone. This argument lacks merit, because we have already explained that no cognizable restriction occurred. Gould's attempted reliance on Main v. Thiboutot, 448 U.S. 1, Inada v. Sullivan, 523 F.2d 485 (7th Cir. 1975), is misplaced. Inada dealt with a threat by a police officer that, if true, barred the plaintiff from pursuing his lawful claim against the police officer. Consequently that case dealt with the direct impingement of the

individual's rights, a situation not applicable to Gould. Thiboutot, while expanding the reach of 42 U.S.C § 1983, held only that statutory claims raised under Section 1983 were proper claims for which attorneys' fees under 42 U.S.C § 1988 would be available. The case did not address the issue whether claims based on the Supremacy Clause would be cognizable under Section 1983. The Supreme Court has elsewhere recognized that not all statutes secure rights within the meaning of Section 1983, even though individuals may benefit from their provisions. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 19; Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28. Section 1983 was enacted to override discriminatory state laws, provide a remedy where state law was inadequate, and furnish a federal remedy

where the state remedy, although adequate in theory, was not available in practice. Monroe v. Pape, 365 U.S. 167. The Eight Circuit, when faced with the problem whether a Commerce Clause claim was cognizable under Section 1983, found the function of the Commerce Clause, relating not to individual rights but rather to the distribution of power between the state and federal governments, to be the dispositive factor. Consolidated Freightways Corporation of Delaware v. Kassel, 730 F.2d 1139, 1146 (1984). That court recognized that both the Supremacy and Commerce Clauses "limit the power of a state to interfere with areas of national concern." Id. at 1144. After an examination of the purposes of Section 1983 as defined in Monroe, the court stated that "[t]o hold that an alleged violation of the Commerce Clause

constitutes an action cognizable under § 1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act." Id. at 1146. That reasoning applies to the issue before us and similarly bars our allowing attorneys' fees based solely on Gould's success on its preemption claim.[16/]

16/ The court in Consolidated Freightways relied in part on Chapman v. Houston Welfare Rights Org., 441 U.S. 600. Its doing so emphasizes the identity in function between the Supremacy Clause and the Commerce Clause. Chapman dealt with the question of whether a Supremacy Clause claim brought in district court under 42 U.S.C § 1343(3) was cognizable under Section 1983, and held that it was not. That result supports the one we reach, (Footnote continued)

But in addition to its preemption claim, Gould raised two Fourteenth Amendment claims, one based on due

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although it is not dispositive since it was based on the wording and legislative history of Section 1343(3). Gould brought its claim based on both 42 U.S.C. § 1331 and Section 1343(3) and therefore and had a different jurisdictional predicate. Nonetheless, the variance between the role of the Supremacy Clause and that of Section 1983 in the federal governmental scheme convinces us that Section 1983 does not encompass claims based strictly on preemption.

process and the other on equal protection, both of which are cognizable under Section 1983. Such claims might provide a basis for attorneys' fees under Section 1988. Should the preemption claim on which Gould has prevailed arise out of a common core of facts or be based on legal theories related to its Fourteenth Amendment claims, awarding attorneys' fees would be proper. Hensley v. Eckerhart, ____ U.S. ____, 76 L.Ed.2d 40. Gould has not, however, met this standard. Gould's due process and equal protection arguments centered on the restriction that the Wisconsin statutes

placed on Gould's federal rights. But we did not hold the statutes preempted by the NLRA for this reason. As seen, the NLRA preempts the Wisconsin legislation because it imposes a penalty for repeated violations of the NLRA, not because it burdens Gould's appeal right. Since Gould's appeal right is not impermissibly burdened, it has no basis on which to claim attorneys' fees. Consequently they are denied.

The district court's invalidation of the Wisconsin statutes is affirmed, but that part of the decision awarding Gould attorneys' fees is reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

GOULD, INC., a Delaware Corporation, with its principal place of business in Illinois,

Plaintiff,

v.

ORDER
83-C-104-C

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR and HUMAN RELATIONS, and WISCONSIN DEPARTMENT OF ADMINISTRATION, STATE BUREAU OF PROCUREMENT, and JAMES GOSLING, Secretary, Wisconsin Department of Industry, Labor and Human Relations, JOHN K. DRISCOLL, Director, State Bureau of Procurement, Wisconsin Department of Administration, JAN RICHARDSON, State Bureau of Procurement, Wisconsin Department of Administration and GARY C. SHEALY, Chief, Labor Standards Bureau, Wisconsin Department of Industry, Labor, and Human Relations, Equal Rights Division,

Defendants.

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In this civil action, plaintiff Gould, Inc., seeks injunctive and declaratory relief with respect to defendants'

continued enforcemnt of Wis. Stats. §§ 101.245 and 16.75(8)(1981), which bar an employer from doing business with the State of Wisconsin or its agencies if the employer has had three or more National Labor Relations Board findings which have been affirmed by a federal court of appeals. Plaintiff asserts that the statutes are unconstitutional in that they (1) violate the supremacy clause of Article VI of the United States Constitution; and (2) violate plaintiff's rights under the due process and equal protection clauses of the Fourteenth Amendment.

In an order dated February 18, 1983, I issued a preliminary injunction ordering defendants to honor Gould's existing contracts with the state, to entertain future procurement contract bids from Gould, and to affirmatively revoke all notices to state agencies and state

vendors that Gould is barred from doing business with the state.

Plaintiff and defendants have now moved for summary judgment, contending they are entitled to judgment as a matter of law. From the parties' stipulation of fact, I find there are no genuine issues as to the following facts.

FACTS

Plaintiff is a Delaware corporation with its principal place of business in the state of Illinois. Plaintiff has approximately twenty separate and autonomous divisons, each engaged in the development, manufacture, and sale of distinct and often unrelated products at separate locations throughout the United States and certain foreign ccuntries. Each division has a separate budget and profit and loss statement, as well as

separate personnel and facilities. Each division is responsible for the conduct of its own labor relations.

Defendants, Wisconsin Department of Industry, Labor and Human Relations, Wisconsin Department of Administration, and the State Bureau of Procurement, are all administrative agencies of the State of Wisconsin. The four individual defendants are heads of, or employees within, these agencies. James Gosling is the Secretary of the Department of Industry, Labor and Human Relations; John K. Driscoll is the Director of the Bureau of Procurement; Gary C. Shealy is the chief of the Labor Standards Bureau within the Department of Industry, Labor and Human Relations; and Jan Richardson is an employee within the Bureau of Procurement.

On May 21, 1980, Wis. Stats. §§101.245 and 16.75(8) (1981) became effective. These statutes are commonly referred to as the Labor Law Violators List statutes. They require the Department of Industry, Labor and Human Relations to maintain a list of employers who have had three or more adverse findings by the National Labor Relations Board affirmed by a federal court of appeals within the preceding five years. Once an employer is put on the list, it is barred from selling products in the State of Wisconsin for three years.[1/]

1/ Section 101.245 provides:

> (1) The [Department of Industry, Labor and Human Relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions

(Footnote continued)

Prior to the effective date of these statutes, various divisions of plaintiff were found guilty by the National Labor Relations Board of four separate violations of the National Labor Relations Act. Each Board determination was

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> involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act. ...
>
> (1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.
>
> * * *
>
> (4) A name shall remain on the list for 3 years.

Section 16.75(8) provides:

> The [Department of Administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the [Department of Industry, Labor and Human Relations] under §101.245.

appealed before May 21, 1980, and three of the four determinations were affirmed by federal courts of appeal before May 21, 1980.[2/] All four cases involved the refusal of one of plaintiff's divisions to comply with a determination of the Board. In three of the four cases, the Board initiated the appeal after the relevant divison had refused to comply. In the fourth case, both parties cross-appealed to the court of appeals. As of August 25, 1982, none of the divisions involved in these National

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2/ Gould, Inc., 216 N.L.R.B. 1031 (1975), enforced in part, reversed in part, 1977 CCH Labor Relations Cas. ¶11,953 (per curiam) (6th Cir. 1976); Gould, Inc., 221 N.L.R.B. 899 (1975), enforced, 550 F.2d 1060 (6th Cir. 1977); Gould, Inc., 237 N.L.R.B. 66 (1978), enforced, 610 F.2d 316 (5th Cir. 1980); Gould, Inc., 238 N.L.R.B. 618 (1978), enforced, 638 F.2d 159 (10th Cir. Dec. 18, 1980).

Labor Relations Act proceedings was still owned by plaintiff.

By letter dated August 25, 1982, plaintiff was notified of its inclusion on the labor law violators list and its debarment until July 1, 1985. As of the date of the letter, plaintiff's Medical Products Division and its Instruments Division were doing business with the State of Wisconsin in amounts in excess of $10,000, and has outstanding bids submitted to the State of Wisconsin in excess of $10,000. These divisions, as well as all of plaintff's divisions, are proscribed under Wisconsin's Labor Law Violators List statutes from further bidding for state procurement contracts until July 1, 1985. Prior to this court's entry of a preliminary injunction against them, defendants notified all current and potential state vendors that

they could not sell products to the State of Wisconsin which contain Gould-produced components. Finally, absent the preliminary injunction, all outstanding Gould contracts with the State of Wisconsin would have been cancelled as soon as the state could have done so without penalty.

OPINION

Jurisdiction is present. 28 U.S.C. §1331 and 1343(3).

I. Eleventh Amendment Immunity

The three non-individual defendants, the Department of Industry, Labor and Human Relations, the Department of Administration, and the Bureau of Procurement, have moved for dismissal of this suit against them for lack of subject matter jurisdiction. The law is clear that under the Eleventh Amendment

to the United States Constitution, state governments and their administrative agencies are immune from federal suits for monetary damages, Edelman v. Jordan, 415 U.S. 651, 663 (1974), and for prospective injunctive relief, Alabama v. Pugh, 438 U.S. 781, 782 (1978). Therefore, this suit will be dismissed with respect to the three non-individual defendants.

However, plaintff's suit against the four employees and departmental heads represents a different issue. The Eleventh Amendment immunity doctrine does not preclude a federal court from enjoining state officials sued in their individual capacity from enforcing any state law found to be repugnant to the United States Constitution. Ex parte Young, 209 U.S. 123 (1908); see Edelman v. Jordan, 415 U.S. at 664. Such

prospective equitable relief may be granted by a federal court even though such an injunction might have ancillary effects on the state treasury. Quern v. Jordan, 440 U.S. 332, 337 (1979).

Plaintiff's suit to enjoin the individual defendants' continued enforcement of Wis. Stats. §§101.245 and 16.75(8) (1981) does state a valid cause of action over which this court may exercise jurisdiction.[3/]

3/ In its complaint, plaintff requested a damages award in an amount to exceed $10,000. In its motion and briefs for summary judgment, plaintiff makes no explicit references to its request for monetary damages. I assume from that omission that plaintiff has abandoned that claim. See Taylor v. Fee, 233 F.2d 251, 259 (7th Cir. 1956).

II. Federal Preemption

A. Current Labor Preemption Doctrine

The proper analytical approach to the doctrine of federal labor law preemption is not easy to discern from the case law. See, e.g., Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274, 285 (1971); Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio St. L.J. 277, 300 (1980). The United States Supreme Court discussed the doctrine in New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979), but the plurality of opinions in that case left many unanswered questions. Nonetheless, I believe a logical approach can be derived from the New York Telephone opinion and from the line of cases preceding it.

The United States Supreme Court has identified two tests for federal labor preemption. The first is the "arguably protected/arguably prohibited" test set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Under this test, the initial inquiry is whether the activity purported to be regulated by the state action is either protected under §7 of the National Labor Relations Act, 29 U.S.C. §157 or prohibited under §8 of that Act, 29 U.S.C. §158, or arguably so protected or prohibited. Garmon, 359 U.S. at 245. The second inquiry under Garmon is whether the regulated activity is "merely [a] peripheral concern of the Labor Management Relations Act...[or] touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional

direction," it cannot be inferred that Congress has deprived the states of the power to act. Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977) (quoting Garmon, 359 U.S. at 243-44).

In Farmer, the Supreme Court emphasized that the Garmon analysis is not to be applied mechanically. Rather, application of the second inquiry is to be by a case-by-case balancing test under which a court must determine whether an exception to the general presumption of federal preemption is warranted. A state's legitimate nonlabor interests in regulating the activity in question must be balanced against the federal government's interests in uniform labor regulation and the likely degree to which the state regulation will interfere with those federal interests. Farmer, 430 U.S. at 297-301. If the activity subject

to state regulation is merely a peripheral concern of the National Labor Relations Act, minimal weight is to be given to the federal interest factor. If the state regulated activity touches state nonlabor interests deeply rooted in local feeling and responsibility, the state interests factor is given a relatively large weight in the balancing equation. Finally, if the state law "is so structured and administered that, in virtually all instances, it is safe to presume that [state] judicial supervision will not disserve the interests promoted by the federal labor statutes," Farmer, 430 U.S. at 290 (citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 297-98 (1971)), then the degree of state interference with federal interests is given a small value in the balancing analysis.

It is important to note that Garmon's "absent compelling congressional direction" language is not to be invoked merely by mechanically classifying the state regulated private activity as a peripheral concern of federal labor law, as touching deeply rooted local interests, or as virtually never disserving federal interests. Rather, it is only if the net balancing of these factors weighs against federal preemption that the general presumption favoring federal preemption will not be invoked "in the absence of compelling congressional direction" to preempt.

The second avenue to federal labor preemption was developed in Local 20,

Teamsters Union v. Morton, 377 U.S. 252 (1964) and Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). Under the Morton/Machinists test, a court looks to whether Congress intended the neither protected nor prohibited private conduct to be governed only by the free play of economic forces. Machinists, 427 U.S. at 144; New York Telphone, 440 U.S. at 530-31. If the answer is "yes," then

Farmer's balancing test analysis must be performed.4/

4/ The second part of the Morton/-Machinists test is the focal point of much of the confusion over federal labor law preemption. In Machinists v. Wisconsin Employment Relations Com'n, 427 U.S. at 147-48, the Court stated that the "crucial inquiry" is whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes," (quoting Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)). The authors of the various opinions in New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) tended to focus their disagreemnt upon what presumption of congressional intent follows from this "crucial inquiry," with a "majority" of concurring and dissenting justices agreeing that any state regulation which significantly affects the balance of economic bargaining forces between labor and management is presumptively preempted in the absence of express congressional direction to the contrary. Id. at 547-49 (Blackmun, Marshall, JJ., concurring); id. at 560 (Powell, Stewart, JJ., and Burger, C.J., dissenting); see The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 270 (1979). Unfortunately, this

(Footnote continued)

Both commentators and courts have recognized that the essence of federal labor preemption analysis is the Farmer balancing test. That is, in the absence

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controversy in New York Telephone obscured the fact that while Machinists identified as a "crucial inquiry" the question whether exercise of state authority would frustrate implementation of the Act, Machinists did not hold that it was the sole inquiry. Indeed, in Machinists, the Court recognized that under this second test for federal labor law preemption, the other two factors of the overall Garmon balancing test are also relevant. Machinists, 427 U.S. at 136. See Teamsters v. Morton, 377 U.S. 252, 257 (1964). Moreover, in New York Telephone, Justice Steven's plurality opinion found that the general applicability and protection of deeply rooted local intersts of the New York unemployment compensation law counterbalanced the law's frustrating effect upon federal labor law interests. New York Telephone, 440 U.S. at 540. In his concurring opinion, Justice Blackmun agreed that the Garmon "deeply rooted local intersts" factor might be relevant under the Morton/Machinists test for preemption, but thought it irrelevant under the particular facts of the case. Id. at 550-51.

of an express statement by Congress, all private conduct will be either arguably protected, arguably prohibited, or left to the free play of economic forces, and thus fall into either the Garmon or Morton/Machinists line of analysis. Since both these doctrines dictate that the Farmer balancing test should be applied to the facts of each case, that test is the correct focal point for federal labor preemption analysis. See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1351-68 (1972) and Recent Development, 64 Cornell L. Rev. 595, 609-12 (1979) (cited in Palm Beach Co. v. Journeymen's and Prod. Allied Servs., 519 F. Supp. 705, 711-12 n. 10 (S.D.N.Y. 1981)); see also Wilkes-Barre v. Newspaer Guild, 504 F. Supp. 54, 66 (M.D. Pa. 1980) ("The cases that have excepted tort claims from the preemption

doctrine are consistent with the 'frustration' test, 'reflect[ing] a balanced inquiry into such factors as the nature of the state and federal interst in regulation and the potential for interference with federal regulation.'") (quoting Garmon, 359 U.S. at 244) (emphasis added).

If, on balance, the three Farmer factors (state interest, federal interest in uniform labor regulation, and frustration of that federal interest) weigh in favor of state regulation, there is no federal preemption.[5] If, however, the balance of the three Farmer factors

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[5] Of course, this assumes that there is no express congressional direction of preemption.

weighs in favor of preemption, the state law must be declared preempted.[6/]

B. Merits

Defendants assert that the state's proprietary interest in its purchases of goods and services is a traditionally

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6/ Again, this assumes no express congressional statement of deference to state power in the specific area or activity under scrutiny.

local matter deeply rooted in local feeling and responsibility.7/

7/ Defendants have relied heavily upon the "market participant" doctrine enunciated in Hughes v. Alexandria Scrap Corp., 416 U.S. 794 (1976), Reeves, Inc. v. Stake, 447 U.S. 429 (1980) and succeeding cases. Defendants argue that the state is not regulating private conduct between labor and management but is merely influencing it pursuant to Wisconsin's legitimate proprietary powers. Under the Hughes/Reeves doctrine, state action is not subject to the traditional balancing analysis under the dormant commerce clause, see e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), if the state is acting as a "market participant" rather than a "market

(Footnote continued)

In deciding whether similar assertions met the first element of the Farmer balancing test, other courts have

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regulator." White v. Massachusetts Council of Constr. Employers, ___ U.S. ___, 103 S. Ct. 1042, 1045-46 (1983). In essence, defendants argue that a similar "market participant" categorical exception also should be applied to exempt state proprietary action from scrutiny under the federal labor law preemption analysis. This is incorrect.

> In Hughes v. Alexandria Scrap, the Court noted expressly that this exception from dormant commerce clause scrutiny arose only "in the absence of congressional action. ..." Alexandria Scrap, 426 U.S. at 810. Nothing in the commerce clause prohibits congressional restrictions of state actions which have the pur

(Footnote continued)

asked whether the state law is one of "broad general application" or one

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pose or effect of interfering with the free flow of interstate commerce or which interfere with the uniformity and supremacy of federal labor law. Only the Tenth Amendment raises such a possible limitation on federal preemption power and defendants do not assert that the statutes in this case are protected from federal National Labor Relations Act regulation under the Tenth Amendment's state immunity doctrine as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976). Indeed, such an argument would appear dubious given the Supreme Court's analysis of the third prong of the National League of Cities test in E.E.O.C. v. Wyoming, ____ U.S. , 103 S. Ct. 1054, 1060-64 (1983).

> Therefore, the federal labor law preemption balancing test must be performed to ascertain whether Congress intended implicitly to preempt state laws such as Wis. Stats. §§101.245 and 16.75(8). Whether these statutes promote local proprietary interests is relevant only insofar as that is probative in determining whether such interests are "deeply rooted in local feeling and responsibility," i.e., whether they promote legitimate, nonlabor state interests.

"specifically directed towards the governance of industrial relations." See, e.g., Garmon, 359 U.S. at 244. Although both Garmon and Farmer, 430 U.S. at 300, emphasized that the general applicability of a state law is not sufficent to exempt it from preemption, in both cases, as well as in the plurality and concurring opinions in New York Telephone, the Court recognized that this factor may be probative of whether the state law has as a predominant purpose the enhancement of legitimate, nonlabor, deeply rooted local interests. New York Telephone, 440 U.S. at 532-33 (plurality) and at 550-51 (concurrence). In general, the Supreme Court has found a deeply rooted local interest only in cases involving state regulation of "personal torts and violence to property, and [its] holdings have been closely circum-

scribed." Wilkes-Barre v. Newspaper Guild, 504 F. Supp. at 66 (citing cases).

In New York Telephone, a plurality of the Court concluded that New York's unemployment compensation statute should be treated as one reflecting deeply rooted local interests because the predominant purpose of that statutory scheme was "not to regulate the bargaining relationship between the two classes [labor and management] but instead to provide an efficient means of insuring employment security in the State." New York Telephone, 440 U.S. at 533. The plurality also relied heavily on the substantial evidence that in fashioning the participatory federal unemployment compensation scheme, Congress had been sensitive to the states' interests in determining the substantive provisions and eligibility criteria of their

unemployment compensation programs. Id. at 539.

The holdings in these cases tend to undercut the force of the defendant's assertion. First, the essence of the Labor Law Violators List law is not one of general applicability. Rather, it is directed specifically towards effecting the labor relations of those employers who are adjudicated federal labor law violators. Defendants have not suggested that §§101.245 and 16.75(8) have any legitimate nonlabor purpose, such as providing remedies for personal torts and violence to property or fashioning an unemployment compensation program. Rather, defendants assert merely that a "deeply rooted historical power of a state is its proprietary capacity to choose from whom it will purchase goods and services." (Defendants' Brief in

Support of Defendants' Motion for Summary Judgment at 9). Such a claim for categorical exemption from federal labor preemption scrutiny is unpersuasive. See supra note 7.

It may be that the exercise of this proprietary function is deeply rooted in tradition. However, in this instance, the exercise of that function has the wholly illegitimate purpose of discouraging federal labor law violations by employers. Defendants concede that this is the purpose of §§101.245 and 16.75(8):

> The state has a deeply rooted policy of discouraging labor law violations, and the State, as a market participator in the purchase of goods and products, can so restrict its purchasers so as not to promote labor law violators as an exception to NLRA preemption ... Wisconsin is not engaging in direct state regulation of private labor conduct, but is merely seeking to influence private conduct already prescribed [sic] by federal labor policy.

Defendants' Brief, cited supra at 12, 18 (emphasis in original). I conclude that the weight to be accorded the state interest reflected in §§101.245 and 16.75(8) is minimal at best.

Under Farmer, the second element is the magnitude of the federal interest in relation to the state regulation. That is, if the private activity subject to state regulation is merely a peripheral concern of the National Labor Relations Act, federal labor interests are only minimally affected by the state action and, therefore, are accorded slight weight in the balancing analysis.

The traditional federal interests in federal labor law preemption have been generally labeled as those of "primary jurisdiction" and "federal supremacy." See e.g., Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199-200

(1978). In essence, these interests are the basis of the Garmon "arguably protected/arguably prohibited" and the Morton/Machinists "free play of private economic forces" tests.8/

These federal interests, aimed at ensuring a uniform national approach to governmental regulation of labor relations, will always outweigh a state interst that is not a deeply rooted, legitimate nonlabor interest if the state regulation significantly affects or

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8/ That is, if the activity is either arguably protected or prohibited by the National Labor Relations Act, this federal regulation of the activity has primary jurisdiction over any state regulation. If indeed Congress intended to leave the activity to the free play of private economic forces, federal supremacy over any state regulation of the conduct is appropriate under the supremacy clause. In both situations there is a need for a uniform national approach to governmental regulation of labor relations.

infringes upon the federal interests. Because I have found that the state's interest in this case is not a deeply rooted one, the only remaining issue to be determined is the degree to which §§101.245 and 16.75(8) affect federal labor interests adversely.9/

Employers who want to appeal from Board decisions will be deterred by Wisconsin's categorical refusal to

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9/ This, I believe, is what the Court meant by its statement in New York Telephone that the "crucial inquiry" is whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." That is, the greater the degree to which the state law frustrates or infringes upon federal labor law uniformity and supremacy interests, the less likely it is that the state law has as its predominant purpose or effect legitimate, nonlabor, deeply rooted local interests. In essence, the Court used the frustration prong as a stand-in for the other two elements of the Farmer balancing test. See supra n. 4.

purchase goods from employers who have three National Labor Relations Board convictions that have been affirmed in whole or in part by a federal court of appeals. Furthermore, employers who might refuse to comply with a Board decision in order to cause the Board to appeal will be deterred from doing so. This state law infringes upon the role of the federal judiciary prescribed under the National Labor Relations Act, cf. In re Sewell, 690 F.2d 403, 409 (4th Cir. 1982):

> To permit a union to [sue an employer in state court] for refusing to bargain [with a union whose certification the employer contests] in violation of S8(a)(5) - a refusal made necessary by the Act in order that the employer can contest certification in a [federal] court of appeals - would, in the words of Farmer, present a "realistic threat of interference with the federal regulatory scheme." 430 U.S. at 305. ...

(Emphasis added.)

Furthermore, a declaration by this court that Wisconsin's statutes are not preempted would open the door for other state debarment statutes, each listing a different number or mix of federal labor violations and convictions as a prerequisite. This would make it difficult for employers to predict the consequences of their actions, cf. Garner v. Teamsters Union, 346 U.S. 485, 490 (1953) (Exclusive jurisdiction is vested in the Board "to obtain uniform application of [the Act's] substantive rules and to avoid [the] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.") In essence, it is a primary function of the Board to determine which "gray area" private acts fall within the protected, prohibited, or "free play"

categories. Wisconsin's law deters employers from engaging in any such "gray area" activities out of fear that the activity might later be declared a federal labor law violation, and state business might thereby be lost.

Thus, Wisconsin's statutes are likely to affect significantly both the initial Board determination that an activity is protected, prohibited, or left to market forces under the Act, and review of Board decisions by the federal courts of appeals. Moreover, §§101.245 and 16.75(8) explicitly provide for substantial cumulative penalties (for three or more affirmed labor law violations) beyond the remedies prescribed by the Board and the Act in general. Cf. San Diego Building Trades Council v. Garmon, 359 U.S. at 247 ("Since remedies form an ingredient of any integrated

scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.").

In summary, I conclude that both the purpose and effect of §§101.245 and 16.75(8) are to significantly infringe upon and inhibit activities and interests that are central to the federal labor policy enunciated in the National Labor Relations Act. Legitimate, nonlabor local interests are not primarily or even significantly furthered by the statutes. Therefore, in the absence of compelling congressional direction to the contrary,[10] the Farmer balancing analysis

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10/ Indeed, as plaintiff points out, any discernible congressional intent is apparently in favor of federal preemption of the Wisconsin statutes since a similar debarment proposal for federal government procurements

(Footnote continued)

compels the conclusion that these statutes are preempted by federal labor

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guished from New York Tel. v. New York Labor Dep't, 440 U.S. 519, 536-44 (1979), id. at 546-47 (Brennan, J., concurring) and id. at 547 (Blackmun, Marshall, JJ., concurring), where in reaching the conclusion that Congress did not intend the National Labor Relations Act to preempt unemployment schemes a majority of justices relied upon the substantial evidence of congressional intent to grant broad discretion to the states in fashioning their unemployment compensation programs.

> Again, in their arguments about the relevancy of the congressional refusal to authorize federal debarment of labor law violaters, defendants confuse federal labor preemption doctrine with the Tenth Amendment's state immunity doctrine. See Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment at 4-6; see supra n. 7.

(Footnote continued)

law and, thus, unconstitutional under the supremacy clause of the United States Constitution.[11]

ORDER

IT IS HEREBY ORDERD that

1) Wis. Stats. §§101.245 and 16.75(8) (1981) are preempted by the federal labor laws and thus unconstitutional under the Supremacy Clause of Article VI of the United States Constitution;

2) defendants are permanently enjoined from (a) debarring plaintiff from doing business with the State of Wisconsin pursuant to §§101.245 and 16.75(8); (b) refusing to purchase from

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[11] Because I find that Wis. Stats. §§101.245 and 16.75(8)(1981) are preempted by federal labor law, I do not reach plaintff's due process and equal protection claims.

any state vendor products which contain components produced by plaintiff's divisions; and (c) including plaintff on the "Labor Law Violators List."

Entered this 20th day of December, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Opinion by Judge Cummings
JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 13, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, Jr., Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

GOULD, INC.,

Plaintiff-Appellee,

v. Nos. 84-1115
and 84-2075

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR and HUMAN RELATIONS, et al.,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

No. 83-C-104
Barbara B. Crabb, Judge

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

GOULD, INC., Civil Action File No. 83-C-104-C

Plaintiff,

v. JUDGMENT

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL.,

Defendants.

This action came on for consideration before the Court, Honorable Barbara B. Crabb, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that:

(1) Wis. Stats. Sections 101.245 and 16.75(8) (1981) are preempted by the federal labor laws and thus unconstitutional under the Supremacy

Clause of Article VI of the United States Constitution;

(2) Defendants are permanently enjoined from (a) debarring plaintiff from doing business with the State of Wisconsin pursuant to Sections 101.245 and 16.75(8); (b) refusing to purchase from any state vendor products which contain components produced by plaintiff's divisions; and (c) including plaintiff on the "Labor Law Violators List."

APPROVED this 20th day of January, 1984

/s/ Barbara B.Crabb
BARBARA B. CRABB, District Judge

Dated at Madison, Wisconsin, this 23 day of January, 1984.

/s/ Joseph W. Skupniewitz
Clerk of Court
JOSEPH W. SKUPNIEWITZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GOULD, INC.,

Plaintiff-Appellee,

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Defendants-Appellants.

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that the defendants-appellants herein appeal to the Supreme Court of the United States from the final decision and judgment of this court, entered on December 13, 1984, insofar as said judgment affirmed the judgment, order, decree or decision of the district court. This appeal is taken

pursuant to 28 U.S.C. secs. 1254(2) and 2101(c).

Dated this 18th day of February, 1985.

BRONSON C. LA FOLLETTE
Attorney General

/s/ Charles D. Hoornstra
CHARLES D. HOORNSTRA
Assistant Attorney General

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 84-1115 and 84-2075

GOULD, INC.,

Plaintiff-Appellee,

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS, et al.,

Defendants-Appellants.

CERTIFICATE OF SERVICE

CHARLES D. HOORNSTRA, being a member of the bar of this and the United States Supreme Court, certifies that he served the plaintiff-appellee with a copy of the notice of appeal to the United States Supreme Court on behalf of the defendants-appellants by causing same to be deposited in the United States mails, postage pre-paid, on the 18th day of

February, 1985, addressed to its counsel of record, to wit: Columbus R. Gangemi, Jr., and Gerald C. Peterson, Winston & Strawn, One First National Plaza, Chicago, Illinois, 60603, pursuant to Rules 10.2 and 28.3 of the United States Supreme Court. All parties required to be served have been served.

Dated this 18th day of February, 1985.

/s/ Charles D. Hoornstra
Charles D. Hoornstra

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No. 84-1484

Office - Supreme Court, U.S.
FILED
APR 10 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

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LAWS INVOLVED

Constitutional Provision

Article VI of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes

1. Section 10(a) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(a) provides in pertinent part:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

2. Section 10(c) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(a) provides in pertinent part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

3. Section 10(f) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160(a) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order in any United States court of appeals * * * Upon the filing

> of such petition, the court shall . . . have . . . jurisdiction to . . . make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . .

MOTION TO AFFIRM

Appellee, Gould Inc., by its attorneys, moves the Court to affirm the decision below. The question on which the cause depends is so insubstantial that it warrants no plenary hearing because:

1. The Seventh Circuit, in finding Wisconsin's Labor Law Violators List Statutes (Wis. Stats. §§ 101.245 and 16.75(8) (1981)), preempted by the National Labor Relations Act (29 U.S.C. § 151 *et seq.* ("NLRA" or the "Act")), added no new principles of law. The decision follows this Court's holding in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Appellants do not contend otherwise.

The Seventh Circuit held that the Statutes, which debar employers for three years for NLRA violations, regulate conduct governed by the Act and impose an unlawful penalty. Congress has long recognized debarment as a potent method of regulating federally proscribed conduct. *See,* the Walsh-Healy Act (41 U.S.C. § 35 *et seq.*), the Bacon-Davis Act (40 U.S.C. § 276a *et seq.*), the Rehabilitation Act of 1973 (29 U.S.C. § 793), and Executive Order 11246.

But Congress considered and *rejected* debarment as a means of regulating NLRA conduct. *Proposed Labor Law Reform Bill of 1978,* S. 2467, H. 8410, 95 Cong. 2d Sess. 30 (1978), because debarment is a penalty (*see, Statement of Sen. Hatch (R. Utah)*, 124 Cong. Rec. S. 13843 (May 16, 1978)), while national labor policy is remedial. *NLRB v. Newport News Shipbuilding & Dry Dock Co.,* 308 U.S. 241 (1939).

Garmon teaches:

> [T]o allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict. 359 U.S. at 247.

2. Wisconsin, seeking to evade *Garmon's* teachings, now poses as a mere buyer in the market place, not as a regulator of

labor conduct. Appellants were not so modest in the district court. There they asserted:

> The state has a deeply rooted policy of discouraging labor law violations, and . . . as a market participator . . . can so restrict its purchasers so as *not to promote labor law violators* as an exception to NLRA preemption . . . Wisconsin . . . is merely seeking to *influence private conduct* already prescribed [sic] by federal labor policy. (Emphasis in original) App. 73.

The Seventh Circuit opinion punctures any "private buyer" pretense (App. 30-38).

Appellants rely on *non*-NLRA cases to support their position (Jurisdictional Statement pp. 10-17). Those cases involve the reach of the dormant Commerce Clause. However, Congress exercised its full Commerce Clause authority in enacting the NLRA. *Polish National Alliance v. NLRB,* 332 U.S. 643 (1944); *NLRB v. Fainblatt,* 306 U.S. 601 (1939). Thus, as explained by all four judges below (App. 21-22, 67 n.7), the cases relied on by appellants are patently inapplicable.

Indeed, *National League of Cities v. Usery,* 426 U.S. 833 (1976), one of the cases appellants rely upon, was expressly *overruled* this term. *Garcia v. San Antonio Metropolitan Transit Authority,* Nos. 82-1913 and 82-1951, ____ U.S. ____, 53 L.W. 4135 (February 19, 1985).

3. The Jurisdictional Statement asserts, "The Circuits are conflict." Yet, appellants confess, "No other decided case is on all fours." (Brief p. 17.) In fact no Court of Appeals has held that a state may debar, or otherwise penalize, an employer because the employer was found to have violated the NLRA.

The Seventh Circuit opinion demonstrates in detail that the claim of conflict is invalid (App. pp. 22-31). For example, in *J. P. Stevens & Co. v. Jackson,* 99 LRRM 2827 (N.D. Ga. 1978), a major case relied on by appellant to establish conflict, the issue of NLRA preemption was neither argued nor decided.

In *Image Carrier Corp. v. Beame,* 567 F.2d 1197 (2nd Cir. 1977), *cert. denied,* 440 U.S. 979 (1979), the Second Circuit dealt only with the issue of whether the city ordinance coerced employees to join unions or altered the collective bargaining relationships of non-union shops. It did not reach the issue of whether Congress intended to preempt local practices which alter collective bargaining relationships.

Finally, *Amalgamated Transit Union v. Byrne,* 568 F.2d 1025 (3d Cir. 1977) (*en banc*) dealt with the issue of whether the state could withdraw state subsidies to transit companies that agreed to uncapped cost of living clauses. As the Third Circuit noted, New Jersey's interest, as a primary source of operational funding, was in providing essential local transportation services to the public, *not* in regulating labor relations *per se.* Here, Wisconsin's purpose is undisputedly that of regulating labor conduct.

4. Although the Seventh Circuit disagreed with the district court's finding that the blacklist statutes unlawfully interfered with an employer's rights to judicial review of NLRB decisions (App. 76-77), appellee does not abandon that contention which sustains the Seventh Circuit's judgment.

Wisconsin's statutes unlawfully deter employers from seeking judicial review of NLRB decisions, thereby interfering with the development of national labor policy. Substantive national labor policy evolves on a case-by-case basis subject to judicial review. *NLRB v. Weingarten, Inc.,* 420 U.S. 251, 265 (1975). *See also, NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Thus, Congress determined that the courts of appeals have superior authority to properly interpret the Act. *NLRB v. Brown,* 380 U.S. 278, 290-292 (1965).

Under Wisconsin's statutes, an employer may commit any number of unfair labor practices without risk of debarment. If the employer acquiesces in the Board's finding of unfair labor practices, it will not be debarred. *Only* if judicial review is

sought is the threat of debarment made. If the employer loses three appeals, no matter how *bona fide* they may have been, and even if the Board is affirmed only in part, the employer is blacklisted. *See e.g., Gould Inc.*, 216 NLRB 183 (1975) *enf'd in part, den. in part,* 77 CCH Lab. Cases § 11,953 (6th Cir. 1976).

Judicial review of Board unfair labor practice decisions is an integral part of the statutory scheme. For example, under the NLRA, the only way an employer can obtain judicial review of a Board bargaining unit determination is to refuse to bargain with the union, an unfair labor practice under § 8 of the Act which permits judicial review. That is precisely what happened in *Gould Inc.*, 237 NLRB 66 (1978), *enf'd*, 610 F.2d 316 (5th Cir. 1980).

Likewise, Board precedent sometimes so lacks stability, in the absence of judicial review, that an employer who, in good faith, challenges a Board decision cannot properly be denigrated as a "recidivist" as claimed by the Jurisdictional Statement. Thus, in *Gould Inc.*, 238 NLRB 618 (1978), *enf'd*, 638 F.2d 159 (10th Cir. 1980), the Board found that a Gould division committed an unfair labor practice by discharging two sympathy strikers. An arbitrator found that the no-strike clause included sympathy strikes. The Board ignored that ruling and held the discharges illegal. The NLRB now holds such discharges lawful. *Indianapolis Power & Light Co.*, 273 NLRB No. 211 (January 31, 1985).

Accordingly, appellee prays that the Seventh Circuit judgment be affirmed. All four judges below were not wrong—they simply followed this court's rulings. This court's time and energy should not be wasted in restating those rulings.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

COUNSEL OF RECORD LISTED ON INSIDE COVER

APPEAL WAS DOCKETED MARCH 8, 1985
PROBABLE JURISDICTION WAS NOTED
MAY 20, 1985

BEST AVAILABLE COPY

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Appellants,

v.

GOULD, INC., a Delaware Corporation,

Appellee.

RELEVANT DOCKET ENTRIES
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Date	Nr	Proceedings
2/2/83	1	Complaint
2/3/83	2	Motion by plaintiff for prelim injunction
2/3/83		Summons issued

Date	Nr	Proceedings
2/15/83	4	Notice of filing
2/18/83		Hrg. on mo for P.I. *** Motion granted
2/18/83	10	Order granting mo for P.I. Cys. mld.
2/18/83	11	Notice of mo for P.I.
2/23/83	13	Defts' ANSWER.
4/18/83	14	Transcript on Hrg on PI on 2/18/83
4/27/83	15	Deft's PPTC Report
5/5/83	16	PTC Order (WLG)
6/8/83	17	Pltf's mo for SJ
6/8/83	19	Deft's mo for SJ
12/21/83	28	Order permanently enjoining defts. cc. mld.
1/17/84	29	NOTICE OF APPEAL by defts.
1/20/84		Shrt. record mld. cc counsel.

DOCKET ENTRIES
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Dated	Proceeding
9/17/84	Oral argument
12/13/84	Opinion
12/13/84	Judgment

PRELIMINARY INJUNCTION OF
FEBRUARY 18, 1983, IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

This matter being heard on plaintiff's Motion for Preliminary Injunction on February 18, 1983 and this Court being duly apprised of the premises:

NOW THEREFORE IT IS ORDERED that plaintiff's motion for preliminary injunction is granted and defendants are hereby ordered:

1. To honor plaintiff's existing contracts with the State of Wisconsin and its departments and subdivisions (the "State");

2. To accept and grant plaintiff's bids to provide goods and services to the State;

3. To cease publishing and circulating a "Notice to Bidders" listing plaintiff as a "Labor Law Violator";

4. To advise all bidders who have received a copy of the "Notice To Bidders" that Gould is in no

way restricted from doing business with the State;

5. To advise all state purchasing agencies that Gould is in no way restricted from doing business with the State.

. . .

TRANSCRIPT OF PROCEEDINGS
OF FEBRUARY 18, 1983

[3](Whereupon said proceedings in the above-entitled civil action were commenced in open court as follows:)

CLERK NELSON: 83-C-104, Gould, Inc. versus Wisconsin Department of Industry, called for Hearing on Preliminary Injunction.

May we have the appearances, please.

MR. J. DAVID RICE: Your Honor, the plaintiff appears by local counsel, Rice & Abbott, J. David Rice.

And I would like to move, at this time, the admission of Gerald Peterson to the bar of this court for the purpose of

conducting this hearing. He is a member of the State Bar of Illinois and a member of the firm of Winston & Strawn, which of counsel in this action.

THE COURT: Thank you, Mr. Rice.

The motion is granted.

MR. PETERSON: Thank you, Your Honor.

MR. DAVID RICE: The defendants appear in the action by David C. Rice, Assistant Attorney General.

THE COURT: Thank you.

MR PETERSON: Your Honor, in filing our [4]Motion for Preliminary Injunction and the exhibits thereto, we neglected to file the affidavit of Mr. Robert L. Neylan, who is Gould's Vice President of Employment Relations. This affidavit was filed with the state in the State Administrative Proceedings.

I have discussed this matter with Mr. Rice for the defendants, and he has no objections to our attaching that as an exhibit to our motion.

THE COURT: That's right, Mr. Rice?

MR. DAVID RICE: Yes.

THE COURT: All right.

MR. PETERSON: In addition, Your Honor, it has come to our attention since the filing of this motion that the State of Wisconsin or that the University of Wisconsin is building or about to open a new veterinarian school; and that it will be letting bids on certain instruments which will be needed in that matter.

The bids, it's our understanding, will be let very shortly and that under their normal practice and procedure, the contracts will be awarded within 30 days of the letting of the bid.

We do have Mr. Howard Boyle here, present here, who can testify on the harm that will be done to Gould if this injunction is not granted.

THE COURT: All right. Besides him, Mr. [5]Peterson, is there anyone else that you were planning to elicit testimony from, or were you prepared to just argue the law?

MR. PETERSON: I think we were prepared to argue the law. Mr. Boyle was the only witness.

THE COURT: All right.

Mr. Rice, do you want to have Mr. Boyle put on the stand or would you be prepared to stipulate that there may well be and are bidding opportunities for Gould at this time that Gould may be precluded from obtaining because of this particular listing?

MR. DAVID RICE: Your Honor, I would have no problem agreeing to what you have just stated. I am not personally familiar with the specifics of that particular bid, but I would agree with what you just said.

THE COURT: The reason I ask is that you seem to have made a point in your brief of arguing a lack of need for a Preliminary Injunction regardless of the merits of the issue.

And if that particular aspect is going to be a point that you're going to emphasize in your argument, I think that I want to allow plaintiff a chance to get that on the record in a definite and concise fashion so it is not an issue.

MR. DAVID RICE: Your Honor, although I [6]signed the brief that's been filed on behalf of the defendants, I was not the author of the brief; and I

might take a different perspective in terms of my approach to the case.

But in any event, in my argument today all I had planned on arguing was the constitutional issues themselves. And I do not intend to make any argument on the question of harm.

THE COURT: All right. Then for the record it is agreed between counsel that there are bidding opportunities presently available for Gould in the State of Wisconsin for State of Wisconsin contracts and for products that Gould manufactures and that Gould will be precluded from delivering--I guess I should stop because I'm not sure whether Gould is just out of the bidding process all together or whether it's in the bidding process but not allowed to be awarded the bid.

In any event, whether it's not allowed to bid or whether it's not allowed to obtain the award of the bid, the result is the same that Gould will not be able to win any of these bids because it is presently listed as a labor law violator, and that this is harm that Gould will suffer if the present law is upheld.

Would you agree to that or do you wish to refine it in any way?

[7]MR. DAVID RICE: No, I would agree to that.

THE COURT: Okay.

All right then, counsel, I'll hear you on the merits of the argument itself, the law.

MR. PETERSON: Thank you Your Honor.

THE COURT: Mr. Peterson, you may sit or stand as you wish. If you would like to, perhaps pull that lecturn podium

thing over, you could stand in a way that the people who are here in the courtroom would have a good chance to hearing you.

MR. PETERSON: Thank you, Your Honor.

May it please the Court: Counsel, Your Honor. In this case the defendants do not challenge any of the facts asserted by Plaintiff Gould, that is, plaintiff has had contracts with the State of Wisconsin, plaintiff is authorized or was authorized to bid on contracts in the State of Wisconsin, that the defendants advised plaintiff on August 25th, 1982 that because the plaintiff had sought judicial review of various National Labor Relations Board decisions and lost on appeal, Gould could no longer do business with the State of Wisconsin.

Plaintiff's explanation for their conduct is that the Wisconsin Labor Law Violator's List simply [8]encourages obedience to law as federally adjudicated. This statement, Your Honor, is found in defendants' brief at Page 15. The explanation given by the defendants for their conduct or the reason fully establishes the unconstitutionality of the statutes and defendants' conduct thereunder.

Unquestionably, Your Honor, the statutes are preempted by the National Labor Relations Act and are, thus, unconstitutional under the Supremacy Clause of the Constitution.

The test for preemption is set forth by the Supreme Court in Perez v. Campbell, 402 U.S. 637, 649 and the case is cited therein, a 1970 decision. And that test is as follows:

The test for preemption is whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

With regards to the National Labor Relations Act, direction and appropriateness was to establish industrial peace, uniform national development of Section VII, Rights of Workers, as those rights are defined by the National Labor Relations Board and the United States Courts of Appeals, including the United States Supreme Court.

[9]Indeed, Congress, in implementing the National Labor Relations Act, established that the federal courts, courts of appeals, are given superior authority over the National Labor Relations Board to determine what the

federal labor law policy is in keeping with the National Labor Relations Act.

The statutes, the Wisconsin Labor Law Violator's List statutes in truth and defendants' actions taken thereunder intrude upon congressional policy by penalizing only those employers who challenge various decisions of the National Labor Relations Board.

Under the statute only an employer could violate the National Labor Relations Act thousands of times so long as it acquiesced in the Board's decision. But if the employer, in good faith, believed that the National Labor Relations Board was wrong and sought judicial review either by requiring the National Labor Relations Board to enforce its act, to enforce its decision, or by petitioning the Court for review itself, if that employer took that action, it is

at risk of being debarred by the State of Wisconsin.

THE COURT: Well, is that really a likely situation? I mean, is it likely that an employer is going to sit by and not appeal when it thinks it has been unfairly found in violation by the NRLB?

[10]MR. PETERSON: Well, Your Honor, from a simple statement, yes. Here we have an employer, for example, Gould, which does well over $250,000 worth of business in the State of Wisconsin.

It must weigh not only the fact that on appeal it stands a chance of losing, but it must weigh not only its chances of winning, vis-a-vis whether or not it owes an employee back pay or what its labor contract means. It now must weigh that as a business decision whether or not, if unsuccessful on appeal, it will lose business.

So that is a real choice that employers are now forced with making, are forced to make that they were not forced to make before. It is a risk which is added to their right to appeal. If they do not appeal, they run no risk of losing business with the state.

THE COURT: Well, let's talk about the real world. I would suspect with a company the size of Gould that some of the decisions by the NRLB, we're talking about a lot more than $250,000 being at stake.

For example, if the NLRB were to find that there had been some sort of inequitable treatment in pay for separate jobs, we might be talking about millions of dollars.

[11]I mean, are you suggesting that most--in terms of what you're arguing, which is real and an actual deterrent to

appealing, how real is a quarter of a million dollars versus some of the sizes of--the cost of repairing some of the conditions that have led to the violations?

MR. PETERSON: Well, for example, Your Honor, the normal type of case would be a discharge of one worker where the National Labor Relations Board has alleged it was on account of that worker's union activities because that person was a union member.

That case, in terms of money value, back pay, by the time it gets to the National Labor Relations Board, would it be about two years' salary. Maybe $20,000 minus lawful deductions and plus interest, of course. So that's a $20,000 case in terms of cost to the employer.

He may wish to appeal that decision because, as is often the case, the

National Labor Relations Board has applied the wrong test, that is, the employer in fact had a very good reason for discharging the employee.

But now he must weigh whether or not he is going to assert his right to manage is facility as he feels he is entitled to under federal law, or [12]whether he can risk that $20,000 judgment against a loss of, in this case, $250,000 worth of business.

And the types of cases that Gould has appealed, which form the basis for the State's decision to debar Gould, we have a case where Gould was required by law to commit an unfair labor practice in order to obtain judicial review of the Board's decision. This was an election certification case.

The only way that Gould could determine whether or not that union

properly represented its employees was to challenge the Board's decision on the certification by refusing to bargain with the union because federal courts do not have jurisdiction over the National Labor Relations Board decision to certify a union in an election.

So, Gould was required, by federal law, in order to determine whether or not the Board acted properly, to refuse to bargain with that union. There was no showing at all, nor was there any statement in that case, that Gould was acting out of anti-union animus. Rather, Gould was simply to determine whether or not that union in fact properly represented its employees. In that type of case we are again dealing with a situation where an employer in our case, say it is 250,000, but another employer it might be more, is going to weigh,

[13]do I run the risk of beng found guilty of a violation of the National Labor Relations Act and lose business or do I let my union employees be represented by a union which is not properly certified for them.

THE COURT: Mr. Peterson, would it be fair to say that your argument on this alleged interference with appeal rights has two aspects to it?

First of all, there's some sort of due process argument that it is improper for the government to interfere with access to the courts, including appellate rights; and, secondly, that it is related to the scheme encompassed by the National Labor Relations Act which includes the right to appeal from the decisions of the NRLB?

MR. PETERSON: That is correct, Your Honor, with one addition.

It is also, we believe, a violation of the equal protection aspects of the Fourteenth Amendment, that is, to place a burden on persons solely because they appeal is in fact a violation of the Equal Protection Provision --

THE COURT: I think that's one of your weaker arguments, so I wasn't going to deal a lot with that.

What kind of infringements can a state [14]constitutionally place on somebody's exercise of appellate rights or trial rights?

In the criminal law area there are situations, for example, where someone is charged with a crime for which the penalty is death. And in some states they have an arrangement in which a person charged for a crime for which the penalty is death can only be sentenced to death by a jury.

Now the Supreme Court has said that the fact that the right to trial by jury is burdened by this extra penalty which could not be imposed if the person went to trial by a judge only, is not such a burden as to make that particular choice an unconstitutional one to impose upon a defendant.

The point is, there are burdens that you can place upon exercise of certain rights related to trial and appeal. What is too much and what is not too much?

MR. PETERSON: Well, Your Honor, with regard to the National Labor Relations Act, we would take the position that any imposition on the Section VII rights of the employees or the Section VIII obligations of the employer, the State has no business in that particular area of the law, the National Labor Relations Act.

[15]Insofar as the rights of appeal, I believe in Lindsey v. Normet, the state had imposed a penalty on tenants who appealed eviction notices and the penalty was double the rent. If they lost the appeal, they were required to forfeit double the rent; while if they did not appeal, then they were, of course, only obligated to pay normal rent.

And the Supreme Court in that case held that that was an unfair imposition on the tenant's right to appeal his eviction. The fact that he was now at a risk that but for his appeal he would not be at risk at all was the unconstitutional burden.

So to the extent that in a criminal or other civil setting where the state has, of course, absolute control, the state may not, once it has established the appeal right, it may not burden that

right unnecessarily. It may not require an appellate to do things that he would not otherwise have to do based upon the judgment blow. It can't penalize him solely because he appealed.

And that's what the State of Wisconsin has done with regards to the federal statute in this case. Where Congress has set a federal statute in federal framework, then the State must take care that their actions do not impinge upon that federal framework.

[16]For example, if the State of Wisconsin were to pass a law saying that it would not purchase any goods from any employer who allowed women to work overtime because the State of Wisconsin believes women should not be allowed to work overtime, that, of course, flies in the case of Title VII; and it would be

preempted by Title VII under the Supremacy Clause.

It impinges on the grant of a federal right. Or in the case of an employer under the National Labor Relations Acts, it impinges upon his obligations.

Again, Garmon is another example. Garmon establishes, under the preemption doctrine, that where the National Labor Relations Board is active, the states are ousted of all jurisdiction. Garmon made it clear that a state cannot punish, reward or interfere with conduct solely because that conduct may or may not violate the National Labor Relations Act.

So, where the conduct is being punished, reward or interferred with by the state solely because that conduct is violative or protected by the National Labor Relations Act, the state may not

act at all. Only where the state's interest is peripheral to the National Labor Relations Act and not conditioned upon whether or not the employer or employee is asserting rights established thereunder, may it act.

[17]For example, in Farmer v. Carpenter, the employee sued the union for unlawful discrimination in other activities as well as tortious interference with the contract, with his right to contract with his employer.

The Supreme Court stated that although we recognized the state tortious interference, that state tort may not be based upon the union's alleged unfair labor. It must be separated from the union's alleged unfair labor practice or the state or that statute or the state law would be preempted.

THE COURT: This would be a lot easier case, wouldn't you agree, if the State of Wisconsin said we aren't going to contract with employers who refuse to bargain with a duly-certified union?

MR. PETERSON: I'm sorry?

THE COURT: All right. The State of Wisconsin said, we're not going to contract with employers who refuse to bargain with a duly-certified union.

I think this would be clearly unconstitutional because the state would be inserting itself at the level that the NLRB is clearly solely responsible for, that is, what are the penalties that accrue to an employer who fails to bargain with a union that has been duly-certified by the NLRB.

[18]This scheme is this happens, this happens and this happens, and one of the things that can happen is that the

employer fails to bargain, that the NLRB can seek an enforcement against the employer.

MR. PETERSON: That is correct.

THE COURT: Okay.

MR. PETERSON: I believe that that statute would be just as unconstitutional as this statute.

THE COURT: All right.

MR. PETERSON: I don't think you want to say it's easier.

THE COURT: But it is clearly the state would be inserting itself into this scheme and adding the permits that would be imposed upon an employer for violations of the federal act.

MR. PETERSON: That is correct.

THE COURT: Okay. What makes this case, I think, more difficult, understanding the same, is that we're talking

about a situation which is several steps removed.

We have the employer who, let's say, just for illustration, refuses to bargain with a duly-certified union in order to get judicial review of the certification decision and is, in the process, charged with a labor violation.

[19]And the appellate procedure goes forward and the employer is found to be in the wrong.

MR. PETERSON: That's correct.

THE COURT: There has been an adjudication that the employer's just flat wrong about the view of the validity of the certification.

Then the employer goes on and does a number of other things, including two other things which are found to be violations of the National Labor Relations Act; and the same sort of

procedure is followed and the employer's now in violation three times.

The defendants argue that nothing about what the state does at that point is interfering with the operation of this federal scheme because it comes afterwards and relates really to a status that the employer has rather than either penalizing him at that point for additional acts or deferring him from further bad acts, and that it is peripheral to the whole federal scheme and for that reason is not preempted by the National Labor Relations Act.

MR. PETERSON: Well, Your Honor, the answer to that, I think, is, one, the statutory scheme of the act itself which impinges upon the employer's statutory, as well as other constitutional right to appeal, asserts agency decision.

[20]But aside from that, getting to the point of the employer's obligations under the Act, Congress set forth the fact that the National Labor Relations Act is remedial, not punitive in nature. Once the National Labor Relations Board has acted and it is enforced by the court, the federal court enforces the remedy imposed by the National Labor Relations Board.

Therefore, at the time the employer must comply with the decision of the National Labor Relations Board and must implement the order of the National Labor Relations Board. Therefore, once the employer has implemented the order of the National Labor Relations Board, it is no longer in the status of a labor law violator. It has complied with the actions required of it by the National Labor Relations Board to remove itself

from the category of a labor law violator.

The only thing that the State of Wisconsin does is punish someone for having violated the act and then remedied the situation. Because if the employer did not remedy the violation, the federal courts certainly have contempt powers. They may throw the employer in jail until he cures his contempt.

The National Labor Relations Board has extraordinary remedies which it may impose, and those extraordinary remedies will be enforced by the Courts [21]of Appeals.

For example, where an employer has been particularly egregious in his unfair labor practices, the National Labor Relations Board may, despite the fact that a union lost the election, require that employer to recognize and bargain

with that union with regards to wage terms and other conditions of employment.

That order is enforceable by the United States Courts of Appeals; and, of course, the penalty for violating the order of the United State Court of Appeals is contempt.

So the State of Wisconsin adds nothing to this. It only impinges upon it by adding a remedy--not a remedy, but a punishment which Congress specifically refused to allow the National Labor Relations Board.

And in Garmon the Supreme Court pointed out that what the state is doing is attempting to regulate conduct which is regulated right now by the federal government. As a matter of fact, in their brief that's what defendants state they are doing. The purpose of this law is to compel obedience -- I'm sorry. I

want to quote it correctly. Is to encourage obedience to laws federally adjudicated.

Well, as I pointed out, Your Honor, I believe that the federal courts are quite capable of [22]making sure that their orders are obeyed without the help of defendants.

And again, Your Honor, assuming that the state has a legitimate interest in enforcing orders for the Courts of Appeals and requiring obedience to the law, or that it has a legitimate interest in refusing to purchase from labor law violators, defendants' conduct in the statutes herein are not rationally related to that interest.

The defendants are not concerned with the number or type of National Labor Relations Board violations. As set forth in their decision which was attached to

our motion, they don't care whether or not the violation was technical or egregious or how egregious or whatever. It's only if it's been enforced by a Court of Appeals. They don't care how many times the employer's been found guilty by the National Labor Relations Board and chose not to appeal, or chose to acquiesce in the Board's decision.

They're only concerned with the number of times that the defendant or that the employer's appealed various decisions of the National Labor Relations Board or refused to acquiesce in Board decisions which employers believe in good faith to be wrong.

In each of the cases before you under which [23]Gould was cited, Your Honor, one was a certification, election. The only way the appeal, the only way the decision could be chal-

lenged -- The other involved a sympathy strike where Gould in good faith believed that its contract with the union specifically forbade that very type of strike.

The other case, one of the other cases taken up on appeal was taken up on appeal to determine whether or not the unfair labor practices alleged in that particular charge were covered by another proceeding which was not appealed.

So each of these challenges by Gould dealt with issues of federal law and which needed interpretation by the federal courts.

And, finally, Your Honor, I would like to point out that the last case, or the first case for which Gould was cited, Gould won part of the award on appeal. In other words, Gould took the action and the Court of Appeals agreed that the

National Labor Relations Board was wrong, at least in one instance.

And without that type of review, the National Labor Relations Board can make decisions which employers will not challenge. There will be instances in very good cases where employers will simply be afraid to challenge the decision because it will affect them [24]in their business, and in this case elsewhere in divisions totally unrelated to the unfair labor practices.

THE COURT: Mr. Peterson, are you aware of any other states that have similar laws?

MR. PETERSON: Connecticut, it's my understanding, has a similar statute.

THE COURT: Fairly new?

MR. PETERSON: I believe they were adopted at about the same time. I believe both of these statutes came about

after Congress specifically rejected such a remedy or punishment in the 1978 Labor Reform Bill.

Congress considered and said, no, we will not allow the National Labor Relations Board or federal agencies to debar contractors from doing business with the federal government solely because they have been found guilty of violating the National Labor Relations Act, pointing out that the purpose of the National Labor Relations Act is remedial.

And the State here is discriminating against Gould and other employers similarly situated solely because it has appealed various decisions or has refused to acquiesce in decisions of the National Labor Relations Board in the manner Congress mandated.

Now defendants will, no doubt, argue that they have the right as any pur-

chasers to buy from whomever [25]or wherever they please and refuse to purchase from anyone for any reason or no reason.

Well, as Your Honor I am sure is quite familiar, the law of employee contract's terminable at will. It is well established that, yes, you may do it for any reason or no reason, but not for a reason violative of the law.

Here, the very reason given by the defendants for refusing to do business with Gould is unconstitutional.

THE COURT: I'm not so sure the State is in that position, anyway.

I suspect that they're bound by law to do their purchasing in a manner that's not arbitrary and not capricious and that is fair to everybody concerned.

But, anyway, your point is -- I understand your point and it's not necessary to follow that any further.

MR. PETERSON: Finally, Your Honor, defendants finally argue that they're not hurting the right to appeal because they don't penalize the victorious appealers, which is true. If you win, you don't get penalized; but if you don't take the risk, you never know.

THE COURT: Right. I think that's the whole point of all of the decisions on that issue. We're not talking about the winners, but what happens to the [26]losers. And a person who wins doesn't obviously, have the concern of the death penalty or double rent forfeiture or anything else.

And I see that as not too strong an argument on behalf of the defendants.

MR. PETERSON: Your Honor, is there anything else, any other points that you would like for me to cover?

THE COURT: Perhaps not right now; and perhaps I will later after I have heard from Mr. Rice.

MR. PETERSON: In that case, thank you for listening, Your Honor.

THE COURT: Thank you.

Mr. Rice.

MR. DAVID RICE: May it please the Court: I start with an understanding based on your questions of counsel that you are certainly familiar with the briefs and with the issues involved in the proceeding. And I don't think it behooves me to reiterate all that which is contained in our briefs.

I would like to start, however, with a point that struck me as advancing a

proposition in order to prove an argument when the proposition isn't justified.

And there are basically three arguments that were advanced by counsel and which you discussed [27]with counsel. One has to do with whether the two state laws here involved are preempted because they purport to regulate conduct that's subject to regulation by the federal government.

The second is whether those laws, even if they don't purport to regulate that conduct, nonetheless, are unconstitutional and adversely affect a right given under federal law to pursue a right under federal law.

And the third argument is that in any event the laws are unconstitutional because they create a classification which is not rationally based and does not satisfy the equal protection test.

I intend not to address in greater detail the last section, the last argument, because I think that's really a question of the wisdom of the legislature.

And while I personally have some reservations about that, as do some of my clients, the Wisconsin legislature has passed it. We are bound as an agency and as the Attorney General of the State to uphold the constitutiionality [sic], if we can.

THE COURT: I agree.

MR. DAVID RICE: I want to turn in reverse to the second issue, do we burden a constitutional right.

[28]And when counsel began his remarks he told the court that the company had been advised by the State that because the company had sought to appeal decisions under the National Labor

Relations Act, the company was being denied the right to bid on contracts for the State of Wisconsin and to receive those contracts.

Unfortunately, that's not the case. That's not true. The statute doesn't authorize that, nor has the State taken that position.

You have to look at the state statute. And if you look at Section 101.245, what is says is that the state--basically it says the state won't do business with persons or firms who are found to have violated the National Labor Relations Act, both by the Board and by three federal appellate courts, within a five-year period.

So the important point is that there must be three final decisions of the federal appellate courts.

Well, there are more than one way for a case to get to the federal appellate courts. When I read the draft of our brief, which I didn't author, I was also struck by the fact that the first argument contained there was the one who victoriously appeals would not be subject to the law; and I thought, boy, that was a pretty weak argument. So I discussed it with the author [29]of the brief and we added the next paragraph.

And I think the paragraph on Page 8 and 9 of our brief is an important paragraph because what it shows is that you can have a final decision of an appellate federal court which will result in the application of the state statute involved here where the employer doesn't appeal at all.

And in fact that's what happened in one of the four cases here. If the NLRB

makes the decision and it's adverse to an employer, the employer can sit back and do nothing. But the federal government, the National Labor Relations Board, can take the employer to federal court and can enforce its order and can obtain a favorable decision.

And in fact one of the federal decisions upon which the State relies here was one in which there was no appeal nor cross appeal by the company but was clearly an enforcement action brought by the NRLB [sic].

THE COURT: But is that really different? I mean, as I look at it, there are two possibilities. The NRLB [sic] says, Company, you're in violation. And the two possibilities are the company says, okay, we think they're wrong. We're not going to do anything

about making an award of back pay, let them sue us.

That, unless you're counting on the limited [30]resources of the Department of Labor and the NLRB and everybody else, which is, you know, not -- I mean, that's something to count on that they won't get around to suing you and they'll be too busy suing other people; or you must appeal yourself because you think the NLRB is just plain wrong.

I don't really see that those are two options. It seems to me that unless you can assume with great reason that you'll never be sued for not complying with an order of the Board, the fact is you're either going to be sued or you're going to have to sue in order to get this finally determined as to whether you or the NRLB [sic] is correct. And I just --

MR. DAVID RICE: Well, maybe I am making the argument --

THE COURT: And I guess you're saying that the person's desire to appeal can't be said to be chilled because the person doesn't even have to appeal. The whole matter can get to court without his exercising that right to appeal. But I really have trouble seeing that.

MR. DAVID RICE: I think I'm responding more precisely and maybe I am not stating it as I should have.

But I am responding to the argument made that there is a classification here and that the statute [31]penalizes those persons who do appeal, but those persons who do not appeal can violate with impunity the federal statute as many times as they would like without fear of ever being subject to the state law.

And that is the point I think I am trying to make that it simply is not true. That if you violate many times and you choose not to appeal, you still are subject to the Board coming in and getting a federal decision which would affect your right to have a contract.

THE COURT: Oh, I see what you say. But that goes to the equal protection argument that we decided wasn't too terrific anyway.

MR. DAVID RICE: I guess that's right. I guess that's right. I think either way you reason it out I am not convinced that it affects --

THE COURT: Can we go back to the statute, because in looking at it again I was struck by something and I want to ask you how you understand the wording of the statute.

In Paragraph 1 of Section 101.245 it says: "if the three final decisions involved a cumulative finding of at least three separate violations of persons and firms that have been found to be in contempt of court for failure to correct the violation of the National Labor Relations Act on three or more occasions."

[32]Now what I want to know is does that mean that an employer gets an adverse decision from the NLRB and either continues to violate or appeals, has his case heard in the Court of Appeals and gets an adverse decision from the Court of Appeals, and violates the law after getting the adverse decision from the Court of Appeals, and then is found in contempt of the Court of Appeals?

MR. DAVID RICE: The answer is no.

THE COURT: Okay.

MR. DAVID RICE: The statute's not a model.

THE COURT: It's really in violation of a Board order rather than contempt of court.

MR. DAVID RICE: Yeah. I think you have to read the statute. And if the Court will read with me Instruction 1: that the list shall be, and here's the preposition that's important, of persons or firms starting there, a list of persons or firms who have been found by the National Labor Relations Board and by three different final decisions of a federal court within a five-year period.

As determined under (1) if the three final decisions involved a cumulative finding of at least three separate violations to have violated the National Labor Relations Act, and then there is a cite and then there is a comma and then

it says, and of persons or firms. [33]And I think that means you relate back to the list in the second line.

THE COURT: So they're talking about two?

MR. DAVID RICE: And a list of persons who have engaged in contemptuous conduct. So it's separate.

THE COURT: Oh, okay. All right.

MR. DAVID RICE: There are some problems, though, with the construction of this statute, some problems that were raised by the company before the State agency, as to the propriety of its being placed on the list.

Questions about whether there have to be three NRLB [sic] decisions and three judicial decisions all within the five-year period of not [sic]. And there is some ambiguity here.

But it seems to me, if it is to be resolved, that is a question for the state courts and not for the federal court.

Did I answer your question?

THE COURT: Um-hum. Thank you.

What is your response to this argument that in precluding a labor law violator from winning a state bid, the State is adding an additional penalty to a scheme that is otherwise complete, and that when it tries to do that, it is in violation of the NLRA and [34]the Supremacy Clause?

MR. DAVID RICE: Well, I think that's just a question of perspective. It's like the three blind people looking at the elephant. I think it's a question of how you view it.

I think that we view it as not as a regulatory statute, not as an additional

penalty, but merely as an exercise of State's right to determine with whom it is going to contract.

THE COURT: How can you say that? I guess I just don't follow that.

I have trouble seeing why it's not another penalty. It seems to me to be closed out of a market is a pretty big deal. If you said that people whose company started with the initial "J" couldn't obtain contracts in the State of Wisconsin, I think that would not be legal.

I mean, I don't think the State is completely free to contract with anyone it wants to or to exclude anyone it wants to from the bidding. I think there has to be rules and regulations that it follows.

Now XYZ Corporation out there on State Street, privately owned, can buy

from anybody it wants to, and it can be as arbitrary or capricious as it wants to be; but I don't think the State can just say, well, on [35]this bid for ball point pens for DOA, we're only going to buy from companies that are located in town south of Waunakee or something like that, unless there is some sort of valid reason for doing that. But everybody who is north of Waunakee could argue that they're being penalized for the location of their business.

MR. DAVID RICE: Well, I'll respond to it in two ways. First of all, as I said before, I don't think it is perceived as a penalty. We may disagree about that.

THE COURT: By the contractor it's perceived that way.

MR. DAVID RICE: But I don't see it as a penalty for having violated the act;

and I understand that perhaps you see it that way.

Then the question is, under the Federal Preemption Law, and under the National Preemption Law, is there congressional intent to preempt the State even where a state's conduct does affect labor-related conduct.

There are certain exemptions, certain exclusions, one which is in the area where the conduct is a peripheral matter either to the concerns of the federal law or touches on interests which are deeply rooted in local affairs.

The Reeves case cited in our brief stands [36]for the long-standing proposition that states do have a right to participate in the marketplace as do private employers. That long-standing and recognized right in this particular context in the question you have raised

it could give it an exemption from federal preemption because it is a peripheral matter and because it does affect something that's of concern to the states.

THE COURT: Well, let's go back. I understand your point that even if it is a penalty, it's peripheral. But let's talk about whether or not it's a penalty because if you had some persuasive argument on that point, I would like to hear it.

I just have trouble seeing it as anything but a penalty. And if I'm missing something, I'd like some help because I don't see how you can characterize it in any other way.

MR. DAVID RICE: It has the effect of penalizing the employer. I am not going to stand here and tell you that I disagree with that.

THE COURT: Okay. So then we move on to the question, it is a penalty. But the effect upon the NLRB is so minimal or so peripheral that it can't be said to interfere with the purposes of that act. And, therefore, it is not considered to be preempted.

MR. DAVID RICE: Well, that's the basic [37]sort of preemption, of course, is whether there is interference. And, yes, we say there wouldn't be such interference as the law is developed. That is a case of first impression, at least in the research that I have been able to do.

None of the preemption cases that I have looked at, they have been cited in both parties' briefs, even approach this kind of a case. Most of them, as you said earlier, have to do with what kind of regulation was the underlying

conduct. The deflammatory conduct is the race discriminatory conduct, picketing violence, whatever. We don't really have that here, except to the extent, and maybe this is where I get back to the penalty and view it somewhat differently, it seems to me it penalizes the conduct. But it is almost after the fact. I can't make a clear distinction here for you. I am not able to express it.

Maybe it's just that it's so removed from the adjudicatory process under which the federal agency and the federal court first determines the violation that in the exercise of its contracting right the State is so far removed that it's not a penalty. I don't know how to state that other than as I have.

THE COURT: Well, certainly, the employer has an adequate opportunity to

be heard. I mean, there's [38]no violation of due process in the determination of the factual inquiry did the employer or did the employer not violate the act. That's certainly not at issue.

In that Machinists case, I didn't write down the name of the defendant --

MR. DAVID RICE: That was the State, too.

THE COURT: That's right. Wisconsin. The United State Supreme Court talked about preemption in two categories of cases. The first is those that reflect a concern that one form would enjoin as illegal conduct which the other form would find legal. We're not talking about that.

The second is those that reflect concern that the application of state law by state courts would restrict the

exercise of the rights guaranteed by the federal act.

Now they were talking, and I think most of us would see that in terms of rights to negotiate, rights to picket, rights to strike, rights to lock out, whatever, all of those things that are ongoing in the general relationship between employers and employees over their ability to negotiate their differences under the law. And the Court was not concerned in that case, obviously, with the exercise of appellate rights.

But I'm not sure that that quotation [39]would exclude the exercise of appellate rights. And that is one of the rights as guaranteed under the NLRA while the Court didn't say it there, there is this question which Mr. Peterson has raised, and I think it's a very valid

argument, and that is promoting the purposes and goals of the act through remedial measures rather than punitive measures is the manner that Congress has chosen to go.

And adding on this punishment by the State does seem to be a determination by the State of Wisconsin that regardless of the way Congress wants to attack this problem, we, the State, want to attack it by keeping these people out of the market and keeping them from competing with our supposedly non-violating companies.

I understand that the State can say things like, well, you can picket and we can't interfere with your right to picket, but we can interfere with your hitting each other over the head with your picket signs because we have an interest in the safety and peace keeping of our community.

And they can say, you can walk around with your picket signs, but you can't barricade the door to the Police Department because the police need to get out, or things like that, because there are overriding interests in safety and peace and all of those matters that make [40]it possible for the State to make it important for the State to be able to regulate conduct for those ends. And they can do it as long as it's very narrowly defined and just focused on the behavior that the State is impowered [sic] to protect.

But here the concern of the State is the State concern that the federal government has. What is it that is going to keep people from violating the laws against mistreatment of employees? We think that not letting them contract is

one thing that's going to keep them from violating in the future.

MR. DAVID RICE: That's viewing it as a regulatory statute and that that's the purpose which derives to the legislature.

Another purpose would be, we don't care who violates. We realize we're preempted and we can't regulate the conduct. We simply don't want to expand our funds to persons who have been determined to have violated the law. We don't seek to deter. We just seek not to maybe recognize or somehow spend the State's money in doing business in that way.

To answer, I don't think you addressed the specific question on Machinists. I don't think Machinists ever contemplated this situation either any more than any other preemption cases

have. We are [41]struggling with that language.

The rights under the National Labor Relations Act that were to be left alone by the states in Machinists, in my view, were the rights to essentially engage in economic combat to further your interests, and that even if the state regulation would otherwise not be preempted because federal law would not grant a right or prohibiting something, nonetheless, the State couldn't interfere because it would affect the parties, essentially their economic positions.

There are two cases subsequent to Machinists that raise that question in a pretty difficult context. They are the unemployment compensation cases. And there the courts struggle and reach a result, but it's not terribly compelling in terms of if you grant unenployment

compensation to strikers, are you penalizing the employer or are you aiding the employees? The courts have been pretty lenient in allowing states leeway in those cases.

But I think that the employers in those cases certainly had a good argument that the State, in granting unemployment benefits or denying them, was having impact, perhaps violative. Machinists rationale. But I don't think Machinists was --

THE COURT: Well, they weren't restricting. [42]Perhaps that's the difference. Although the Ohio case really didn't talk about the NLRA.

Well, you're right. I think those were tough cases. I thing it would have been easy to go the other way, perhaps. But I'm sure they really shed much light on what's happening here.

MR. DAVID RICE: I agree.

THE COURT: And I think a distinction that could be made is that there is this other concern of the State and that is what it's going to do with its unemployment fund and how it's going to do the fairest job of distributing a limited amount of money for the well-being of unemployed people.

Now I suppose you can argue that the State has a finite amount of money to do contracting and it should decide how it's going to spend its money; but that doesn't get us very far because Gould may be the low bidder by a high percentage and it may be that the State is actually costing itself money by not purchasing from Gould.

MR. DAVID RICE: This statute, unfortunately, does not enjoy the additional benefits of rational argument

that were made in Ohio, I don't think. I think it has a pretty single-minded purpose.

I'm not sure I agree that it's to deter [43]labor law violators, but it clearly is to put the State in the position of not doing business with them. I think based on everything --

THE COURT: But that has a time limit.

MR. DAVID RICE: There's a three-year time limit, right.

THE COURT: So, presumably, they're hoping that the behavior will change so that they're not shutting the door on the behavior changing so that eventually they can contract with those people in the future.

MR. DAVID RICE: Well, that's true. But any immediate change in behavior doesn't make any difference

because it's a three-year duration and it doesn't matter what the company does in the interim.

THE COURT: That may be just long enough to make sure that it's a sincere change in behavior.

MR. DAVID RICE: I think unless the Court has other questions, the two things that I would observe from all the arguments that we've had is the Court's going to have to come to a decision on whether there is a sufficiently direct interference with federal rights, either by regulating conduct or attempting to regulate conduct, or interfering with procedural rights granted under federal law to justify a finding of unconstitutionality.

[44]In that respect I would just note that the courts have said, and you notice that I did not say because the

statute does not expressly apply to certain kind of conduct that there is no preemption.

But in those cases where the laws are more general and are not directed at the underlying conduct, I think it's harder to find preemption. That's one of the things that they said in the New York Unemployment Compensation case.

But the bottom line is whether or not the State interest is one that unduly interferes with the federal regulatory scheme in the constitutional sense. I leave that to your decision.

I guess I should just add that we recognize, as the Attorney General's Office of Wisconsin and as the named agency defendants here, that this statute does raise difficult constitutional questions. And we don't take them

lightly; and I don't mean by my last comment to suggest that.

I think it's a close question. I don't think there's any law that's been offered by counsel for the company, nor by us, that's conclusive on that question. And it's a question of extending prior precedents and applying them in this particular context to arrive at a result. And I don't mean any disrespect. I think it is [45]a difficult question.

THE COURT: Well, I didn't take it as meaning any disrespect. I took it as sympathetic. I hope that's all that was meant. Thank you.

Mr. Peterson, do you wish to add anything?

MR. PETERSON: Your Honor, at this time I would like to introduce Mr. Columbus R. Gangemi, who also works at

Winston & Strawn; and he will be handling our rebuttal.

THE COURT: All right. Mr. Gangemi.

MR. GANGEMI: Yes, Your Honor. And with your permission I would like to respond.

I'm sorry for this irregularity. I was a little late getting up here and Mr. Peterson kind of took over for me.

We have very little to add, except I would like to direct Your Honor's attention to one of the cases cited in our brief, specifically the case of In Re: Charles Sewell, which I believe is a recent decision of the Fourth Circuit, which I feel is very much on point in this case.

In this case we had a slightly different --

THE COURT: You don't have a copy of that?

MR. GANGEMI: Yes, I do, Your Honor. I do not have an official report of it, but I do have it [46]from the Daily Labor Reporter.

THE COURT: Oh, good. I'm not sure that would be in the advance sheets yet.

MR. GANGEMI: The slip opinion number we have cited in the brief, but we weren't able to get a copy of the slip opinion itself.

May I approach the bench, Your Honor?

THE COURT: Just give it to the Clerk. Thank you.

Mr. Rice, do you have a copy of that?

MR. DAVID RICE: No, I don't.

MR. GANGEMI: I have one for him, Your Honor.

MR. DAVID RICE: Thank you.

MR. GANGEMI: In this case, Your Honor, a union brought in state court an action for tortious interference with contractual relations against a president of a company which had ordered his company not to recognize a union following an election.

The action was removed to the federal court. And the district court judge held that indeed the union could bring such a state court action against the president of the employer for ordering his company not to recognize the union.

The Court of Appeals held that such a [47]state court action was preempted because it interferred with the right of the NLRB and of the federal court to determine whether or not an employer's refusal to recognize a union was or was not an unfair labor practice.

The reasoning of the court is very much on point here, directing Your Honor's attention to the second page of the slip opinion, second column toward the bottom.

I'm quoting from it: "Our review of the Board orders will be encumbered if company officials are required to defend themselves against state tort claims because of their decision to challenge Board certification in this court. A threat of liability for taking steps necessary for appellate consideration of Board orders inevitably will deter petitions for review. Preservation of our jurisdiction to enforce Board orders, therefore, justifies resort to mandamus for resolution of the claim of federal law has preempted state law, et cetera."

The point is this, Your Honor. As in this case, the Wisconsin statute at

issue will interfere with an employer's right to take an appeal to the federal courts of a decision by the NLRB because before he makes that decision to appeal, he must consider the possibility of being debarred from contracts with the State of Wisconsin or the State of Connecticut. It's not a [48]peripheral interference with a federal right. It is a very direct and a very immediate interference with what has to be the most fundamental of federal rights, the right to appeal to the judiciary for relief from an action of an agency.

I've practiced labor law now for 10 or 11 years. There are no regulations under the National Labor Relations Act. It is a well-established doctrine of federal policy that the National Labor Relations Law is developed on a case-by-case basis.

The National Labor Relations Board itself has repeatedly refused to issue regulations concerning the substance of the law that it enforces.

And the reason it does that is because it prefers the case-by-case adjudication. And, likewise, the federal courts and federal labor policy is a result of individual decisions developed on a case-by-case basis.

If we are to have a state like the State of Wisconsin decide that if you exercise that right to go on appeal to a federal court to review the decisions in the National Labor Relations Board, what you have is the state interfering very substantially, I think, with federal labor policy developing in that way.

Now it's true that only the State of [49]Wisconsin and the State of Connecticut thus far have taken this

approach. But if we could stop for a moment and consider what would happen if other states do this also, very substantial and difficult decisions would have to be made by an employer before they would ever make a determination that they would go on appeal.

Mr. Rice has suggested that there is no interference with the federal right because the decision to appeal has already been made and there's been a determination and a final decision. But in point of fact, Your Honor, what we're talking about is future decisions and future choices as to whether or not to reach an appeal.

So we would submit to you that the case of Sewell that I have given you a copy of is directly on point. And we think on the basis of that case and Garmon and the other cases cited to you

by Mr. Peterson, that you should hold the statute to be unconstitutional and to provide us with the Preliminary Injunction that we seek.

THE COURT: Thank you.

Mr. Rice, would you like to add anything?

MR. DAVID RICE: No, Your Honor.

THE COURT: I am prepared to rule. I will start by adopting, without repeating, all of the facts proposed by the plaintiff in its submission filed February [50]15th, 1983, which I understand defendants take no exception to.

I also find as fact that there are presently in the State of Wisconsin bidding opportunities for the plaintiff for contracts with the State of Wisconsin which plaintiff will be unable to take advantage of unless it prevails in this action.

I find that plaintiff has a reasonable probability of success on the ultimate merits of this case, that is, in establishing that Wisconsin Statute Section 101.245 is unconstitutional because it is in violation of the Supremacy Clause of the United States in two respects.

First of all, that the exclusion from bidding which applies to companies that have been the subject of three separate violations of the NLRA that have been adjudicated, does restrict companies in the exercise of rights guaranteed by the federal act, that is, the right to appeal from an adverse decision of the National Labor Relations Board.

Secondly, that the state law adds a penalty to conduct that is the subject of the National Labor Relations Act, conduct that Congress has decided should be dealt

with on a remedial basis; that Congress has had the opportunity to impose penalties in the form [51]of debarment from federal contracting and has declined to enact such penalties and that is reiterated in that respect, if not expressly, the concept that the scheme envisioned under the NLRA is a remedial scheme designed to encourage, sometimes vigorously encourage employers to comply with the NLRA, and has decided that the best way to obtain compliance is through this scheme that it has enacted which encourages employers to comply rather than penalizing them for past acts of noncompliance.

There is a full regulatory scheme under the NLRA which can deal with violations of the NLRB rulings and violations of court adjudications. The efforts of the State of Wisconsin to add

a penalty interfere and impinges upon the scheme that Congress has developed over the years.

Taking up the second aspect of a Preliminary Injunction, I believe that the threatened injury to the plaintiff, that is, the inability to bid on any state contracts, outweighs the harm to the defendant in not being able to enforce the Wisconsin statute.

I think it's clear that the plaintiff has no adequate remedy at law and that it will be harmed if the injunction does not issue.

Although the contracts that we're talking [52]about are contracts that can be recompensed by an award of damages, that is no way to get an award of damages from the defendants in this case; and so the usual standard in any harm that can be recompensed in money does not apply in

this particular action against the State of Wisconsin and its agencies and officers.

I conclude, also, that the granting of a Preliminary Injunction does not serve the public interest and that is, of course, tied up with the original ruling that the planitiff [sic] has a likelihood of ultimate success.

I believe that the public interest in peaceful labor relations is served by the National Labor Relations Act, and that any interference with the working of that scheme would not serve the public interest; and I conclude that this is an interference with the working of that scheme.

Defendants raised one other point which we did not focus on in the argument and that is the question of whether or not the Department of Industry, Labor and

Human Relations and the Department of Administration and various bureaus that were named in the caption of the Complaint may be properly sued in a case seeking money damages, injunctive and declaratory relief.

There is a very good question about the propriety of those defendants being named in this lawsuit; [53]but since there are individual defendants named who can be sued for injunctive relief, I don't think that it is a problem that affects the Court's jurisdiction or the decision on the merits of the Motion for Preliminary Injunction.

Mr. Peterson, I would ask that you submit to me before the end of the day today an order for my signature simply encompassing the essence of the ruling;

not any of the findings of fact or conclusions, but simply the order granting the Preliminary Injunction.

Mr. Rice, is there anything further in this matter that you want to take up?

MR. DAVID RICE: No.

THE COURT: Okay.

Mr. Peterson, anything else?

MR. PETERSON: No, Your Honor.

Thank you very much.

THE COURT: All right. Court will adjourn.

* * *

(Whereupon, said proceedings in the above-entitled civil action were concluded at 3:23 o'clock p.m.)

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(5)

No. 84-1484

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLANTS

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491P

QUESTION PRESENTED

Under the Supremacy Clause and the preemption rules of the National Labor Relations Act ("NLRA"), 29 U.S.C. sec. 151 et seq., may a state refuse to purchase products manufactured or sold by recidivist violators of the NLRA?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. Two of the state officials are described in their official capacity, not by name. See Rule 40.4 of this Court. The Secretary of the Department of Industry, Labor, and Human Relations who was in office at the time the action began has resigned and is succeeded by Howard S. Bellman. See Rule 40.3 of this Court. The three state agency appellants are here sub nomine only, as they were dismissed below. See court of appeals decision at n. 1 (Jur. St. Apx. at 2-3).

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REPORTED DECISIONS

The court of appeals' decision is reported as Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608 (7th Cir. 1984). The district court's decision is reported as Gould v. Wis. Dept. of Industry, Labor & H. Rel., 576 F. Supp. 1290 (W.D. Wis. 1983).

JURISDICTIONAL GROUNDS

Appellee sought declaratory and injunctive relief against Wisconsin statutes on the ground of their unconstitutionality. It posited district court jurisdiction under 28 U.S.C. secs. 1331 and 1343(3). The district court declared the statutes unconstitutional as repugnant to the Supremacy Clause and the preemption principles of the NLRA. Appellants appealed to the Court of Appeals for the Seventh Circuit, invoking

its jurisdiction under 28 U.S.C. sec. 1291.

The court of appeals affirmed and entered its judgment on December 13, 1984. Notice of appeal was filed February 18, 1985, in the Court of Appeals for the Seventh Circuit. This Court noted probable jurisdiction on May 20, 1985. It has jurisdiction under 28 U.S.C. sec. 1254(2).

STATUTES INVOLVED

The statutes declared unconstitutional are Wis. Stats. secs. 16.75(8) and 101.245 (1981) as created by chapter 340, Wis. Laws of 1979, effective May 21, 1980, as follows:

....

> SECTION 2. 16.75 (8) of the statutes is created to read:
>
> 16.75 (8) The department [of administration] shall not

purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245.

SECTION 3. 101.245 of the statutes is created to read:

101.245 Labor law violators. (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least 3 separate violations to have violated the national labor relations act, 29 USC 151 et. seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

(1m) On or before July 1 of each year the department shall compile the list required

under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

(2) This list may be compiled from the records of the national labor relations board.

(3) Whenever a new name is added to this list the department shall send the name to the department of administration for action as provided in s. 16.75(8).

(4) A name shall remain on the list for 3 years.

(5) If any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (1) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should remove the person's or firm's name from the list.

....

STATEMENT OF THE CASE

Appellee is a Delaware corporation principally doing business in Illinois. It has twenty separate divisions. Each division maintains its own labor relations policies. (R.2.)

During a five year period, the federal court of appeals affirmed and/or enforced findings of the National Labor Relations Board (NLRB) of four distinct violations of the NLRA. They were:

> NLRB v. Gould, Inc., 550 F.2d 1060 (6th Cir. 1977), enforcing 221 NLRB No. 127, 91 LRRM 1013 (1974) (unlawful interrogation, surveillance, and discharge threats);
>
> NLRB v. Gould, Inc., 542 F.2d 1176 (6th Cir. 1976), cert. denied, 430 U.S. 907 (1977), enforcing 216 NLRB No. 183, 88 LRRM 1581 (1975) (discriminatory discharge);
>
> NLRB v. Gould, Inc., 638 F.2d 159 (10th Cir. 1980),

cert. denied, sub. nom. Brown Boveri Electric, Inc. v. NLRB, 452 U.S. 930 (1981), enforcing 238 NLRB No. 88, 99 LRRM 1705 (1978) (discriminatory discharge); and

Gould, Inc., Elec. Components Div. v. NLRB, 610 F.2d 316 (5th Cir. 1980), enforcing 273 NLRB No. 16, 99 LRRM 1001 (1978) (refusal to bargain after losing decertification election).

At the material times appellee's divisions were doing business wth the state in amounts in excess of $10,000. One division had outstanding bids in that amount to provide goods and services to the state. On August 25, 1982, pursuant to the state statutes and based on the noted NLRA violations, appellants debarred appellee for three years from doing business with the state, and advised they would cancel existing contracts if that could be done without penalty. (R.2.)

Appellee commenced this action in February 1983 alleging NLRA preemption and a denial of equal protection and due process. On February 18, 1983, the district court granted preliminary injunctive relief. (J. A. at 4-5.) The parties filed cross motions for summary judgment. On January 23, 1984, the district court declared the Wisconsin statutes unconstitutional as preempted by the NLRA, and permanently enjoined the individual appellants from debarring plaintiff under those statutes, refusing to purchase its goods, or including it on the labor law violators list. (Jur. St. Apx. at 45-83, 86-87.) The district court subsequently awarded attorney's fees to appellee under 42 U.S.C. sec. 1988. The court of appeals affirmed the declaration of the statutes' unconstitutionality on supremacy and

preemption grounds but not on equal protection or due process grounds, and reversed the judgment awarding attorney's fees. (Jur. St. Apx. at 1-44, 84-85.)

SUMMARY OF ARGUMENT

Wisconsin's statute directs its purchasing department not to buy from firms who have been found by the federal courts to have violated the National Labor Relations Act (NLRA), 29 U.S.C. sec. 151 et seq., three times in a five year period. Federal appeals courts found appellee to have violated the NLRA on four different occasions in five years.

Wisconsin's decision not to buy from appellee is the act of a market participant, not of a market regulator. The selection of a vendor for its own goods and services constitutes direct

participation in the market. The statute does not direct municipalities or others whether to deal with appellee, nor does it provide a remedy to the victims of the NLRA violations. It is a purchasing decision.

States have the same right as any private entrepreneur to choose with whom they will deal. What is more, a state's exercise of this right implicates sovereign prerogatives over critical policy choices, for which the commerce clause requires no independent justification but for which federalism demands deference.

NLRA preemption relates to state regulation, not its market participaton. The NLRA no more preempts a state's market participant choice than a private corporation's. In fact, the NLRA affirmatively protects the right of

market participants to choose with whom they will deal. The fact that their choices may impact on the businesses of others, including their labor relations, is wholly irrelevant to whether they are the decisions of market participants.

Even if Wisconsin's decision partakes of regulatory features as well as market participant features, traditional NLRA preemption principles are not offended. The NLRA's interest is peripheral at best as to whether Gould and Wisconsin choose to do business with each other. But both Gould and Wisconsin have a substantial interest in preserving their right to make that choice, and under principles of federalism the

state's interest is even weightier because of the political accountability and responsibility entailed.

What is more, there is absolutely no risk of conflicting regulation. The controversy submitted to the federal forum is not at all identical to what is submitted in the state forum. Wisconsin accepts the results of the federal adjudication without question. No relief is provided to the victims. It simply refuses to help the NLRA repeat violators make profits. And the Board could not debar Gould from doing business with Wisconsin.

ARGUMENT

I. Wisconsin Acts As A Market Participant

Wisconsin is acting as a market participant, not a market regulator. For

its decision concerns from whom to purchase its own goods and services.

The question of market participant status reduces to a "'single inquiry: whether the challenged "program constitute[s] direct state participation in the market."'" White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 208 (1983).

Wisconsin's statute directs only its own purchasing department in its choice of vendors. Wis. Stats. § 16.75(8). It does not regulate purchases by municipalities or other nonstate entities. Compare W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486, 494-96 (7th Cir. 1984) (state crossed the participant line and became a regulator by imposing restrictions on local governments). Therefore, the test is met: this statute deals only with

"direct state participation in the market."

Wisconsin's status as a market participant also easily accords with the facts of the lead cases. The City of Camden acted as a market participant in pressuring private employers to hire city residents on the city's own public works projects. United Bldg. & Const. v. Mayor & Council of Camden, 104 S.Ct. 1020, 1028-29 (1984). Boston could do likewise, despite the impact on out-of-state firms, because all affected contractors and employes effectively were working for the city. White, 460 U.S. at 211 n. 7. South Dakota could sell its cement solely to its residents, despite the apparent provincialism. Reeves, Inc. v. Stake, 447 U.S. 429 (1980). For the

dormant commerce clause inhibits the states as market regulators, not as market participants. Id. at 436-39.

> The basic distinction drawn in [Hughes v.] Alexandria Scrap [infra] between States as market participants and States as market regulators make good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place .... There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

447 U.S. at 436-37 (citations omitted). And Maryland, acting as a market participant, could subsidize local scrap processors; the commerce clause "was [not] intended to require independent justification for such action." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-09 (1976).

Wisconsin's choice of a vendor is merely the other side of the Reeves coin,

which concerned the choice of a buyer. Therefore, Wisconsin "unquestionably" acts as a market participant. See Reeves, 447 U.S. at 440. Further, Wisconsin's act is narrower than that upheld in White, where Boston controlled its contractors' choice of employes. Wisconsin controls only its choice of a contractor, not downstream trading partners. A fortiori "it is not relevant" if Wisconsin's act has "a significant impact" on contractors, their trading partners, or commerce in general. See White, 460 U.S. at 209-10.

Further, Wisconsin's status as a market participant fits the standards of even the dissenting opinions. Wisconsin only selects "the providers of the goods it purchases;" it does not "impede trade" among others; rather, it "govern[s] the State's own economic conduct ... to

determine the parties with whom it will deal." White, 460 U.S. at 218, 221-22 (Justices White and Blackmun, dissenting). Wisconsin has "enter[ed] the market to supply its own needs." Reeves, at 447 U.S. at 452 (Justices Powell, Brennan, White, and Stevens, dissenting). Its statute addresses the purchases needed only for its own "end use." Hughes, 426 U.S. at 824 (Justices Brennan, White, and Marshall, dissenting). Nor is Wisconsin's choice as a market participant a ruse for favoring its own residents over out-of-state businesses. Its rule applies to local industry as well.

Thus, this case is unlike South-Central Timber Development, Inc. v. Wunnicke, 104 S.Ct. 2237 (1984). This Court found that Alaska did not act as a market participant when it required, as a

condition of resale of its timber, that it be initially processed within the state. Rather than address the "immediate transaction" of selecting a buyer, Alaska had imposed resale, "downstream restrictions" akin to "restraints on alienation" and "vertical restraints" inimical to antitrust principles. Id. at 2246. Wisconsin, in contrast, imposes no conditions on resale. Its act starts and stops with the "immediate transaction" of selecting a vendor. It would be irrelevant if its act has the "effect of regulating employment" between its vendor and its employes, for the commerce clause itself "places no limitations on a State's refusal to deal with particular parties when it is participating in the interstate market in goods." Id. at 2244. Also compare Hicklin v. Orbeck,

437 U.S. 518, 531, 534 (1978) (invalidating Alaska Hire law that virtually imposed a vertical integration on the industry developing the state's gas and oil reserves).

The underlying constitutional principles reinforce this conclusion. The states long have enjoyed the same right of any trader "'freely to exercise his own independent discretion as to parties with whom he will deal.'" Reeves, 447 U.S. at 438-39. Simply as a matter of "[e]venhandedness ... when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." Id. at 439. Nothing in the Constitution "limit[s] the ability of the States themselves to operate freely in the free market." Id. at 437.

A state's power to choose its trading partners is broad. This Court has said it is "unrestricted" and includes the power to "fix terms and conditions upon which it will make needed purchases." Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). Whether or not the power remains "unrestricted," it is not diminished one whit because it entails a political decision. Reeves, 447 U.S. at 439 n. 12. Indeed, it is because these decisions are "politically charged" that disputes are "better suited for Congress than this Court." Id. at 439.

State sovereignty is implicated. A state need not assert a Tenth Amendment right to "claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." Reeves, 447 U.S. at

438 n. 10. For the state acts "'"as guardian and trustee for its people."'" Id. at 438. And, in claiming this sovereign prerogative, the commerce clause does not require "independent justification." Hughes v. Alexandria Scrap Co., 426 U.S. 794, 808-09 (1976). See generally, Garcia v. San Antonio Metro. Transit Authority, 105 S.Ct. 1005, 1015-17 (1985).

The court of appeals was essentially nonresponsive to Wisconsin's market participant status. It held: (1) the dormant commerce clause cases are inapposite because Congress has legislated decisively in the area, Gould, Inc. v. Wisconsin Dept. of Industry, Labor, 750 F.2d 608, 613 (7th Cir. 1984), Jur. St. Apx. at 22; (2) Wisconsin's purpose is to induce compliance with the NLRA, not to efficiently spend its money,

750 F.2d at 614, Jur. St. Apx. at 29; and (3) Wisconsin has imposed a penalty that intrudes on the remedial structure of the NLRA, 750 F.2d at 612 n. 4, Jur. St. Apx. at 15.

But each of these grounds for striking the statute begs the premise that Congress has foreclosed market participant choices of this sort. If the premise is incorrect, the court left unanswered whether Wisconsin's act is that of a market participant.

No one can doubt that such action by General Motors would be market participant action. It follows, simply as a matter of "[e]venhandedness," that its character remains the same when done by a state. Reeves, 447 U.S. at 439. General Motors can choose not to buy from Gould because of its recidivism without offending the NLRA, and so can Wisconsin;

General Motors' decision would not impose a "penalty" on Gould that intrudes on the NLRA remedial scheme, and neither would Wisconsin's; and General Motors would not need to justify its decision as economically prudent, or apologize for seeking to induce compliance with the NLRA, and neither would Wisconsin.

What is more, Wisconsin's sovereign prerogatives serve to further insulate its policy choices as a market participant from judicial approval. See Reeves, 447 U.S. at 439. General Motors must answer to stockholders. A state's constituency, however, may exact economic inefficiency as a price worth paying for other policy choices, both moral and social, e.g. preserving the environment, promoting affirmative action, improving worker safety, relieving the poor, etc. Nothing in the commerce clause excepts

the state's right to decide whether to acquire its own goods and services from labor law recidivist violators.

It is one matter to agree, as generally we must, that Wisconsin may not regulate conduct regulated by the NLRA, however egregious the conduct may be. It is quite another matter to say Wisconsin must contribute to the profits of miscreants by hiring them. Compare Harris v. McRae, 448 U.S. 297, 316 (1980) (the duty not to interfere with the absolute constitutional right of a woman to abort does not require Congress to pay for it).

II. The NLRA Does Not Preempt The Choices Of Market Participants; It Protects Them

The foregoing teach the distinction between the state as a market participant and the state as a market regulator.

The NLRA cases teach that preemption reaches the states only as market regulators. "The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.'" New York Tel. Co. v. New York St. Dept. of Labor, 440 U.S. 519, 527 (1979) (emphasis added).

At least two reasons explain why Congress has preempted state regulation but not state market participation. First, the very purpose of preemption is to "avoid conflicting regulation of conduct." Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-86 (1971). A state's regulation is the nemesis preemption addresses, not its market participation. Second, the NLRA

regulates the relationship between employer and employe, not the trading partner choices of market participants. The "NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment ... ." Metropolitan Life Ins. Co. v. Mass., 105 S. Ct. 2380, 2396 (1985).

There is no reason to suppose Congress meant to discriminate by preempting the market participant choices of the states but not the market participant choices of private corporations. If anything, one would expect Congress to regulate private industry choices before those of the sovereign states. But it has regulated neither in the NLRA. Wisconsin is as free as General Motors to decline to do

business with appellee by reason of its recidivism.

In point of fact, the NLRA affirmatively protects the market participant's right to select a trading partner. The NLRA forbids union strikes "to force one employer to cease doing business with another." NLRB v. Longshoremen, 447 U.S. 490, 503 (1980). See NLRB v. Denver Bldg. & Constr. T. Council, 341 U.S. 675, 687 (1951). Congress was bent on "shielding unoffending employers and others from pressures in controversies not their own." Id., 341 U.S. at 692. It intended to protect the "freedom of choice ... whether to refuse to deal with another or to maintain normal business relations ... ." Local 1976, U.B.C. & J. v. NLRB, 357 U.S. 93, 105 (1958).

Exceptions to this broad principle are narrow. See Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 625, 635 (1975) (the antitrust principles of free trade will yield where necessary to eliminate competition over workers' wages); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663-64 (1982) (construction industry exception to the ban on "hot cargo" agreements); NLRB v. Pipefitters, 429 U.S. 507 (1977) (work preservation agreements). Apart from these narrow exceptions, even a state or political subdivision may invoke the jurisdiction of the NLRB for protection of its market participant choice of a contractor to contruct its buildings. See Plumbers, Etc., 298 v. County of Door, 359 U.S. 354 (1959).

The principal error of the court of appeals was its failure to appreciate

that the NLRA does not restrict market participant choices. It is ironic that the court of appeals concluded that the NLRA, which protects Wisconsin's right as a market participant to choose with whom to deal, was offended by Wisconsin for choosing not to deal with NLRA offenders.

As a market participant, Wisconsin can make its choices despite impact, if any, on the labor relations of others. Cf. See White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 209-10 (1983) (imposing significant burdens on labor relations in commerce is not relevant to the inquiry whether the city acted as a market participant). Accord, Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3rd Cir. 1977) (en banc) (New Jersey could refuse to subsidize transportation services if the service agreed with its union to pay

a cost of living pay adjustment); Image Carrier v. Beame, 567 F.2d 1197, 1202-03 (2nd Cir. 1977) (city could refuse to buy from nonunion printers). Also see Oklahoma v. United States Civil Serv. Comm., 330 U.S. 127, 143 (1947) (although, as a general matter, Congress may not regulate state employes' political activity, it may do so as a condition of exercising its spending power).

Congress has chosen not to use its spending power or status as a market participant to debar NLRA recidivists. Proposed Labor Law Reform Bill of 1978, S. 2467, H. 8410, 95 Cong. 2d Sess. 30 (1978). The reasons for rejecting the debarment proposal ranged widely, including concern that it was punitive, that it would apply to employers but not to offending unions, and that it would

fall most heavily on innocent employes. See 124 Cong. Rec. S. 13843 (May 16, 1978). The federal government's choice not to exercise its right as a market participant hardly abrogates the right of other market participants to make that policy choice. The contrary suggestion confuses the apples and oranges of market participant versus market regulator, to-wit: "When the State acts solely as a market participant no conflict between State regulation [emphasis this Court's] and federal regulatory authority can [emphasis added] arise." United Bldg. & Const. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984).

Wisconsin's choice as a market participant, rather than conflicting with NLRA regulatory authority, is protected by it.

III. NLRA Preemption Would Not Apply In Any Event

Even if Wisconsin's statute were regulatory and not the choice of a market participant, it is not preempted because (a) the controversy presented to the two forums is not identical and (b) Gould's business opportunities with Wisconsin are at best only a peripheral concern of the NLRA, whereas the right to choose a trading partner is of substantial interest to any market participant, particularly a sovereign state which must make critical and controversial policy choices in the process.

Federal preemption of state law is not lightly implied. Bill Johnson's Restaurant, Inc. v NLRB, 461 U.S. 731, 103 S.Ct. 2161, 2175 (1983) (Brennan, J., concurring). Various "historical powers over ... traditionally local matters" were left to the states by the NLRA.

Allen-Bradley Local No. 1111, etc. v. Wisconsin E. Rel. Board, 315 U.S. 740, 749 (1942). Letting public works contracts is such an established power. Cf. American Yearbook Company v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.), aff'd without opinion, 409 U.S. 904 (1972). This Court demands "compelling congressional direction" before it will oust states from areas that are tradtionally rooted in local responsibility or are merely of peripheral concern to the NLRA. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

Federal preemption never is found unless necessary to "avoid conflicting regulation of conduct." Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-86 (1971). In labor law two doctrines have surfaced to test for

conflict: (1) whether the conduct was meant by Congress to go unregulated, like concerted refusals to work overtime, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976); or (2) whether the conduct arguably is protected or prohibited by the NLRA, like picketing. Garmon, 359 U.S. at 245.

The Machinists doctrine is inapplicable. It relates only to the economic weaponry between union and employer. See Belknap, Inc. v. Hale, 103 S.Ct. 3172, 3188 (1983) (Blackmun, J., concurring).

Garmon's "arguably" standard aims to protect the NLRB's primary jurisdiction. Exceptions have emerged to protect local interests. In such cases, federalism itself "belies any easy inference that Congress intended to

deprive the States of their ability to retain jurisdiction." Brown v. Hotel & Restaurant Employees & Bartenders, 104 S.Ct. 3179, 3187 (1984).

This Court has finely honed Garmon's arguably protected or prohibited test: the state controversy and the federal controversy must be identical. In Belknap, the state could provide a damage remedy to striker replacements, who were promised permanent employment, after the employer removed them pursuant to settlement of an arguably unfair labor practice strike. "The Board would be concerned with the impact on strikers not with whether the employer deceived replacements." Belknap, 103 S.Ct. at 3183. The state court could not order job reinstatement the Board could provide the strikers, but it could provide damage relief the Board could not provide

replacements. Id. Similarly in Farmer v. Carpenters, 430 U.S. 290 (1977), a state court could provide relief for emotional distress arising from conduct the Board could address by other means. Such actions can be adjudicated "without regard to the merits of the underlying labor controversy." Farmer, 430 U.S. at 300. In Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978), the state could regulate the locus of picketing because the Board could address only its purpose. In Linn v. United Plant Guard Workers, 383 U.S. 53, 63 (1966), state law could award damages for defamatory conduct injuring reputation that the Board could remedy only as to its labor relations impact. The task always is to balance the respective federal-state interests and the risk of

conflicting regulation. Farmer, 430 U.S. at 298-301.

Clearly, conflicting regulation is impossible. The controversies presented in the two forums are far from identical. The NLRB could not debar Gould from doing business with Wisconsin. Wisconsin does not adjudicate whether the NLRA was violated or provide a remedy to the employes. It finds only whether the appeals courts have said the NLRA was violated, how may times, and in what period. Wisconsin acts only as a market participant by a "simple unilateral refusal[] to deal." White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 218 (1983) (Blackmun, J. dissenting).

In addition to the controversies being anything but identical, the NLRA interest in preserving Gould's right to

do business with Wisconsin is virtually nonexistent. Indeed, the NLRA's only interest is to preserve the right of traders to decide whether to deal with each other. Wisconsin's interest, on the other hand, is keen: how to spend taxpayers' money and for whose benefit, in purchasng what it needs to carry out its governmental purposes, lie at the core of important social and policy choices for which local responsibility and accountabiity are at their highest. Surely this interest is far more substantial than any peripheral implications the decision may have for the NLRA. Cf. Massachusetts Nursing Ass'n v. Dukakis, 726 F.2d 41 (1984) (sustaining hospital cost containment legislation despite impact on collective bargaining); Golden State Transit v. City of Los Angeles, 686 F.2d 758 (9th Cir.

1982), cert. denied, 459 U.S. 1105 (1982), after remand, 754 F.2d 830 (9th Cir.), cert. denied, 105 S.Ct. 1865 (1985) (sustaining city denial of a taxicab license to one engaged in a labor dispute).

There is no NLRA preemption, then, even if Wisconsin's act is regulatory. First, conflicting regulation is impossible. Second, Wisconsin's interest in choosing a trading partner far surpasses any NLRA interest in how or why Wisconsin makes that choice.

CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of the court of appeals insofar as it affirms the judgment of the district

court that the state statutes in question are unconstitutional.

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No. 84-1484

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Whether the Wisconsin labor law violator contract debarment statutes are preempted by the National Labor Relations Act by virtue of the Supremacy Clause of the United States Constitution.

PARTIES TO THE PROCEEDING

Gould Inc.'s subsidiaries (other than wholly owned subsidiaries) and affiliates are:

Acumuladores del Centro, S.A.
Acumuladores Mexicanos, S.A.
AMI Liegenschaftsverwaltungs-Gesellschaft m.b.H.
Asahi Microsystems, Inc.
Austria Mikrosysteme International Gesellschaft m.b.H.
AMI Micro-systems, GmbH
AMI Micro-systems Limited
AMI Microsystems S.A.R.L.
AMI Microsystems - S.r.L.
Andover Controls Corporation
Bimetal Bearings Limited
Clevite de Mexico, S.A. de C.V.
Eloquent Systems Corporation
Toltec Group Limited
Toltec Computer Limited
Toltec DataRing Limited (i)
Toltec IMSCAN Limited (i)
Compagnie Francaise d'Electro-Chimie
Outarex S.A.R.L.
SIDAC S.A.R.L.
S.I.D.M.A.P.
Societe Nouvelle A.M.B. S.A.R.L.
Guernsey Insurance Management Services Limited
Gould H.B. Medical Products Ltd.
Gould-H.B. Medical Products (Hong Kong) Limited
Gould H.B. Medical Products (Singapore) Pte. Ltd.
Nikko Gould Foil Company, Limited
I-T-E Latinoamericano, S.A. de C.V. (i)
Penske Corporation

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 c1.3 of the United States Constitution provides in pertinent part:

> "The Congress shall have Power to regulate commerce . . . among the several states . . ."

Article VI cl.2 of the United States Constitution provides pertinent part:

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(a), provides in pertinent part:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.

Section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(c) provides in pertinent part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter.

Section 10(f) of the National Labor Relations Act as amended, 29 U.S.C. 160(f):

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in

the United States Court of Appeals for the District of Columbia.

Wis. Stat. § 16.75 provides:

> The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under S.101.245.

Wis. Stat. § 101.245 provides in pertinent part:

> (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period . . ., if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act. . . .
>
> (4) A name shall remain on the list for 3 years.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,

Appellants,

v.

GOULD INC., a Delaware corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

PROCEEDINGS BELOW

On August 25, 1982, appellants, the Wisconsin Department of Industry, Labor and Human Relations, *et al.* ("Wisconsin" or the "State"), debarred appellee, Gould Inc. ("Gould" or the "Company"), from doing business with Wisconsin until July 1, 1985, pursuant to Wis. Stats. §§ 16.75(8) and 101.245 (1981) ("statutes" or 'blacklist laws").

Gould sued appellants alleging that the statutes are preempted by the National Labor Relations Act as amended (29 U.S.C. § 151 *et seq.*) ("NLRA" or the "Act") and violate its rights to due process and equal protection (R.1).*

Gould moved for preliminary relief (R.2). The district court ruled that the statutes restrict employers' rights to appeal adverse National Labor Relations Board ("NLRB" or "Board") rulings and penalize conduct governed by the NLRA (Jt. App. pp. 82-83). It preliminarily enjoined Wisconsin from enforcing same (Jt. App. pp. 5-6).

The parties then stipulated that the material facts, as expressed by the district court, were undisputed (R. 16). Both parties requested summary judgment (R. 17; R. 19).

Based thereon, the district court, concluded that:

1. the statutes have the purpose and effect of regulating conduct governed by the NLRA (J.S. App. pp. 73-74, 80);
2. the statutes interfere with the development of federal labor policy by dissuading employers from engaging in "gray areas" of arguably protected or arguably prohibited activity, thereby depriving the NLRB and the courts of the opportunity to rule on the legality of such conduct (J.S. App. pp. 78-79);
3. the statutes infringe upon the jurisdiction of the federal courts of appeals by deterring employers from seeking judicial review of Board decisions (J.S. App. pp. 76-77);
4. the statutes penalize employers beyond the remedies prescribed by the Board and the Act (J.S. App. p. 79); and
5. the statutes serve no legitimate, deeply rooted non-labor interest of local concern (J.S. App. p. 72).

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* Record entries are cited as "R. ____"; the Joint Appendix is cited as "Jt. App. ____"; and the Jurisdictional Statement Appendix is cited as "J. S. App. ____".

Accordingly, the district court held that the statutes were preempted by the NLRA and unconstitutional under the Supremacy Clause (U.S. Const. art. VI, cl. 2) and enjoined Wisconsin from enforcing its statutes as to Gould[1].

On appeal to the United States Court of Appeals for the Seventh Circuit, Wisconsin did not claim that the district's court's findings were clearly erroneous. Rather, appellants contended that the statutes were not preempted as a matter of law because, *inter alia:* (1) the state, acting as a "market participant", can restrict its purchases so as not to promote labor law violators in keeping with its deeply rooted policy of discouraging employer labor law violations; (2) if the state action does not prohibit or punish activity protected by the NLRA, there is no preemption and, therefore, no penalty (Brief of Defendants-Appellants in Court of Appeals pp. 3, 12, 15).

The Seventh Circuit agreed with the district court that the purpose and effect of the statutes are to regulate conduct governed by the NLRA (J.S. App. pp. 27, 31) and that they imposed a penalty for violations of the NLRA (J.S. App. pp. 15 n.4, 32). Accordingly, it affirmed the judgment of unconstitutionality.

STATEMENT OF FACTS

Gould consists of separate and autonomous divisions. Each is engaged in the manufacture and sale of distinct and often unrelated products. Each maintains its own facilities and equipment. Each establishes and maintains its own personnel policies and procedures. Each division is responsible for its own labor-management relations (J.S. App. pp. 47-48).

Between 1973 and 1980 the Board and courts of appeals found that three of Gould's there 20 divisions had violated the

---

[1] Because the district court disposed of the matter on preemption grounds, it did not reach Gould's equal protection and due process claims (J.S. App. p. 82, n.11).

Act on four occasions. There is no claim that any contempt proceedings were initiated against Gould, from which it may be concluded that after Board orders were enforced, in whole or in part, by courts of appeals, the divisions involved complied. The cases involved a variety of alleged unfair labor practice violations, including a violation necessary to invoke judicial review of an election certification by the Board[2] and a violation involving Gould's discipline of certain union stewards for engaging in a strike during the term of a labor agreement containing a no-strike clause.

As far as can be determined by a review of the reported decisions, in none of the cases did the General Counsel claim that the violations were part of some corporate plan to deny employees their § 7 rights. The General Counsel did not allege that the division involved or Gould was a "recidivist" violator of the Act, nor did the General Counsel seek to impose extraordinary "recidivist" remedies. *See infra,* p. 18 n. 6. Moreover, the Board's remedies were limited to the particular plant or division involved.

In *Gould Inc., Electric Heat Division,* 216 NLRB 1031 (1975), the division's Cookesville, Tennessee plant was accused of violating the Act during a union organizing campaign. The plant was charged with a series of unfair labor practices including discharging employees on account of their union activities, interrogating employees and promising to increase benefits. The Board sustained all the charges and ordered the plant to make the employees whole and post an appropriate notice.

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[2] The Act does not provide for direct appeal of Board decisions in "representation" proceedings under Section 9. If an employer believes that a Board decision as to bargaining unit composition or conduct of election was wrong, the only way it can obtain review is to refuse to bargain with the certified union. *Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 139 (1971). A complaint under § 8(a)(5) issues, summary judgment generally is entered by the Board, and the employer appeals on the ground that the Board's certification was wrong in the first instance.

On appeal, the Sixth Circuit found that the division had not unlawfully promised to increase benefits and refused to enforce that portion of the Board's order. It sustained the remainder of the decision on the ground that it was supported by substantial evidence. *NLRB v. Gould Inc.*, 542 F.2d 1176, 80 CCH LC ¶ 11,953 (6th Cir. 1976), *cert. denied*, 430 U.S. 907 (1977).

Gould Inc., Electric Heat Division, 221 NLRB 899 (1975), arose out of the same organizing campaign at the same plant. The plant was charged with other violations including interrogation, promising benefits, threats and discharging an employee on account of union activity. The plant contended that it had not acted unlawfully and that General Counsel, under the Board's decision in *Jefferson Chemical Company, Inc.*, 200 NLRB 992 (1972),[3] should have brought the charges in the prior proceeding. The plant sought to review employee affidavits obtained by the General Counsel in order to show that he knew or should have known of the basis for the new charges as of the time of the prior proceeding.

The Board found that, while the plant had committed many of the violations as alleged, General Counsel had failed to prove that plant management's decision to discharge the employee was unlawful. It also held that the General Counsel had no reason to know of the asserted violations during the earlier proceeding and, therefore, refused to permit the plant to review the affidavits.

On appeal, the major issue was whether the plant was entitled to inspect the affidavits in order to establish its *Jefferson Chemical* defense. The Court of Appeals found the Board's position a reasonable interpretation of the Act and enforced the order. *NLRB v. Gould Inc.*, 550 F.2d 1060 (6th Cir. 1977).

---

[3] Under *Jefferson Chemical*, General Counsel is foreclosed from issuing a new complaint predicated on events which were or should have been known to General Counsel through his investigation of the charge in the earlier proceeding. *Gould Inc., Electric Heat Division*, 221 NLRB at 899.

In *Gould Inc., Electrical Components Division,* 237 NLRB 66 (1978), the division refused to bargain with the union at its Tampa, Florida facility in order to challenge a Board election certification. The division asserted, in defense of its refusal to bargain, that the union had engaged in election misconduct by waiving dues arrearages of employees thereby interfering with the employees' exercise of free choice during the decertification election. The Board disagreed.

The division petitioned for review of the Board's decision in *Gould Inc., Electrical Components Division v. NLRB,* 610 F.2d 316 (5th Cir. 1980), to determine whether a union could lawfully waive dues arrearages during a decertification campaign. The Fifth Circuit enforced the Board's Order on the ground that the union had a practice of waiving certain dues arrearages and, therefore, that the division had failed to establish specific evidence of a *prima facie* violation.

Finally, in *Gould Inc., Switchgear Division,* 238 NLRB 618 (1978), the division was cited for discharging two union stewards who, it contended, led employees in a strike. The division took the position that the strike violated the labor contract's no-strike clause. The Board found that the strikes were protected activity not covered by the no-strike clause, and that the division had unlawfully singled out the union stewards for discharge.

The Switchgear Division disputed the decision and the Board sought judicial enforcement. In *NLRB v. Gould Inc., Switchgear Division,* 638 F.2d 159 (10th Cir. 1980), *cert. denied sub nom. Brown Boveri Electric, Inc. v. NLRB,* 452 U.S. 930 (1981), the Tenth Circuit affirmed the Board's decision on the ground that the union had not clearly and unmistakably waived its right to engage in sympathy strikes.

None of the foregoing violations occurred in Wisconsin. None involved divisions doing business with Wisconsin. The violations occurred, and most had been remedied, before Wisconsin enacted its blacklist laws. Each of the cases had

concluded, and the violations had been presumably remedied to Board satisfaction, long before August 25, 1982 the date of Gould's debarment. In fact, by August, 1982, Gould owned none of the divisions involved in the charges (J.S. App. pp. 51-52).

As of August 25, 1982, the Medical Products Division and the Instrument Division had contracts to provide goods and services to the University of Wisconsin, including vital medical equipment for which the particular division may have been the sole source (R. 2; Exh. 2). Although neither of these divisions had committed unfair labor practices, as part of Gould they were debarred.

Wisconsin refused to permit the Medical Products and Instrument divisions to bid on future contracts and threatened to cancel existing contracts as soon as possible. Wisconsin also notified other vendors that they could not sell to the state products containing components manufactured by a Gould division (R.5, Exh. 3).

SUMMARY OF ARGUMENT

Wisconsin seeks to have the Court establish a "market participant" exception to the Supremacy Clause of the United States Constitution which has never heretofore been recognized. In a preemption case, it urges application of the market participant exception recognized by the Court only in considering the constitutionality of certain limited exercises of state spending power where Congress has not acted under the Commerce Clause. Here Congress has legislated extensively to create a complex and fully integrated statutory scheme in furtherance of a national labor relations policy.

The market participant exception has served as a constitutional *shield* protective of state actions in which a state favors its local residents over others in its sales, purchases, and similar business transactions. The doctrine's fundamental

premise is that favoritism in such transactions toward those who fund the state's treasury does not offend the Constitution. Such parochialism is mere participation in, rather than regulation of, the market.

But were it applied outside the dormant Commerce Clause arena, however, the market participant exception would be loosed from its conceptual moorings of tolerable local favoritism and become a different doctrine altogether.

Wisconsin would establish it as a constitutional *sword* with which it may cut a path toward *any* goal consistent with its constituents' "social and moral policy choices" (App. Brief p. 30), including those at odds with federal law and policy.

State debarment to punish violation of federal law ceases to be mere participation in the market. It is an effort to regulate conduct—indeed, employer conduct having nothing whatsoever to do with the state's transaction or the market in which it occurs—by a potent means of governance.

Wisconsin, and its amici, virtually ignore *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), and the sensitive balancing test of federal interest in uniform national labor policy versus legitimate non-labor state interests which has emerged from this precedent. They seek exception to it or suggest that the Court must go beyond it. And even in this they cannot agree.

Garmon and the subsequent preemption decisions of the Court are more than adequate to give proper consideration to the state legislation at issue. Wisconsin's labor law violator debarment laws profoundly interfere with the federal statutory scheme in two major respects:

First, Wisconsin imposes a harsh debarment *penalty* for violation of a federal law which Congress intended to be remedial only and from which Congress has excluded federal debarment as a potential consequence of violation.

Second, these laws chill employers in the exercise of their statutory right of appeal to the federal judiciary by imposing its penalties, not upon those who commit unfair labor practices, but only upon those who appeal adverse Board decisions in this regard and lose, even partially.

On the other side of the preemption scale, a legitimate, *non-labor,* local interest *in the employer conduct it seeks to influence and govern,* is non-existent. Wisconsin suggests no local impact, consequence or aspect of the conduct which it has some traditional responsibility to address. Its admitted objective and interest is only to encourage compliance with federal labor laws. There simply is nothing of deeply-rooted local concern to counterbalance the federal interest in a uniform national labor-management policy.

Under such circumstances, the Supremacy Clause dictates that state intrusions must be restrained "regardless of the mode adopted." *Garmon,* 359 U.S. at 244

ARGUMENT

I. WISCONSIN'S STATUTES VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

Under the Supremacy Clause, the Constitution of the United States and the laws enacted pursuant thereto are the supreme law of the land notwithstanding the constitutions or laws of the various states. Since *McCulloch v. Maryland,* 4 Wheat. 316, 436 (1819) (Marshall, C. J.), the Court has held:

> [T]he states have no power, by taxation or otherwise, *to retard, impede, burden, or in any manner control,* the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. (emphasis added.)

State law must be preempted wherever it interferes with or is contrary to federal law, *Gibbons v. Ogden,* 9 Wheat. 1, 211 (1824), or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Thus, "the purpose of Congress is the ultimate touchstone of preemption." *Metropolitan Life Insurance Co. v. Massachusetts,* ____ U.S. ____, 85 L. Ed. 2d 728, 745 (1985).

In enacting the NLRA, Congress declared it to be the policy of the United States to protect the rights of self-organization and collective bargaining between employers and employees, as its chosen means of fostering labor-management peace. *See, Metropolitan Life Insurance Co.,* 85 L. Ed. 2d at 749. By establishing an integrated system for the resolution of "industrial strife," it sought to preserve the free flow of goods in interstate commerce. 29 U.S.C. § 151.

Congress recognized a national problem to be dealt with on a national basis. Congress enacted a uniform and comprehensive national labor policy, in part, because it believed that state legislatures, given the diversity of local attitudes

toward labor controversies, could not be expected to establish a consistent and cohesive labor policy. *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 286-87 (1971); *Garner v. Teamsters,* 346 U.S. 485, 490 (1953); *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971).

The Act prescribes the rights of employees and employers in their relations affecting commerce. Congress protected certain conduct, prohibited certain conduct, and left other conduct to the free play of the parties' economic forces. *Nash-Finch Co.,* 404 U.S. at 144. Thus, Congress occupied the field of labor management relations that the NLRA covers. *Bus Employees v. Wisconsin Board,* 340 U.S. 383, 397-398 (1951); *Guss v. Utah Labor Board,* 353 U.S. 1, 9-10 (1957).

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), is the fountainhead of the labor law preemption doctrine. Justice Frankfurter's articulation of that doctrine is now familiar.

> When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act [citations omitted]. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.
>
> When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the

> federal enactment requires that state jurisdiction must yield.

Id. at 243-44.

Subsequent considerations of *Garmon* by the Court have resulted in the identification of two branches of *Garmon* preemption.[4]

Under the first branch, preemption is mandated where the conduct regulated by the state is actually protected or prohibited by the NLRA. Under this branch "the relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that federal law *must prevail.*" *Brown v. Hotel and Restaurant Employees Union Local 54,* ____ U.S. ____, 82 L. Ed. 2d 373, 384 (1984), *citing Free v. Bland,* 369 U.S. 663, 666 (1962). *See Operating Engineers v. Jones,* 460 U.S. 669, 680 (1983).

The second branch of *Garmon* is invoked when considering state enactments which touch upon matters which are only arguably subject to the NLRA. Under this branch, state laws are presumptively preempted; however, "due regard for federalism" permits the state law to stand where the conduct being regulated is merely of peripheral concern to the Act or is of unusually deeply-rooted local interest." *Brown v. Local 54,* 82 L. Ed. 2d at 384. *See also, Belknap, Inc. v. Hale,* 463 U.S. 491, 498-99 (1983). It is generally utilized in cases where there is a potential for conflict between state tribunals and the NLRB's primary jurisdiction to determine whether arguably protected or prohibited conduct is governed by the Act or when considering state laws of general application which, in the context of a

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[4] Additionally, the Court has delineated another area of preemption where the conduct which the state purports to regulate has been left by federal labor policy to the free play of economic forces. *Compare Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976) *with New York Telephone Co. v. New York St. Dept. of Labor,* 440 U.S. 519 (1979).

particular case, are brought to bear upon aspects of a labor dispute. *See, e.g., San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *Farmer v. Carpenters,* 430 U.S. 290 (1977); *Sears v. Carpenters,* 436 U.S. 180 (1978).

In the instant case, the Wisconsin statutes, by their very terms, address conduct actually subject to national regulation. The statutes are not laws of general application. They are labor relations-directed statutes which operate exclusively against employers who have been held to have engaged in labor relations practices governed by federal law. This is not a matter of indirect effect; it is a matter of deliberate design (J.S. App. p. 27 n. 9, 73-74). Wisconsin's avowed purpose is to "discourag[e] labor law violations" and "influence private conduct already prescribed ([sic]) by federal labor policy." (Brief In Support of Motion for Summary Judgment, R. 22 pp. 11-12, 18). In this case, therefore, "the relative importance to [Wisconsin] of its own law is not material . . ." *Brown v. Hotel and Restaurant Employees Union Local 54,* 82 L. Ed. 2d at 384. Wisconsin is simply ousted of all jurisdiction and may not pass any legislation which seeks to "control conduct which is the subject of national regulation", *Garmon,* 359 U.S. at 244, regardless of the degree of interference with federal policy that it entails and regardless of the extent or "depth" of the local concern involved. "[S]tate jurisdiction must yield". *Garmon,* 359 U.S. at 244.

It is unnecessary, however, to become enmeshed in arguments over which branch of *Garmon* preemption to invoke or whether the employer conduct Wisconsin seeks to "influence" is actually, or only arguably, protected or prohibited. It is unnecessary here to dwell upon the significance of whether the state enactment is a labor law or one of general application. At core, preemption analysis, at the very least, entails a consideration and balancing of the degree of potential interference with federal interest in uniform labor policy against the state's legitimate non-labor interest in the labor conduct it is regulating by application of its law.

Here, as the district court's and, to a lesser extent, the court of appeals' analyses set out, the interference with federal labor policy is both manifest and manifold and the state's legitimate non-labor interest simply non-existent. Indeed, the state and its *amici* tacitly acknowledge this by their varied efforts to avoid, alter, or gain an exception to, the preemption doctrine under the banner of market participation.

Before addressing Wisconsin's market participant theory, however, it is worthwhile to bring into focus the true extent of Wisconsin's intrusion upon federal domain and the absence of any legitimate Wisconsin interest in doing so.

A. Wisconsin's Statutes Interfere With The Federal Statutory Scheme.

1. The Wisconsin Statutes Impose A State-Mandated Penalty For Violation Of Federal Law Inconsistent With The Federal Statutory Scheme.

The keystone of federal labor policy is that federal law serve the goal of industrial peace and stability through collective bargaining. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *NLRB v. Pincus Bros., Inc.*, 620 F.2d 367 (3d Cir. 1980). In enacting the NLRA, Congress circumscribed the role of government intervention to that of maintaining an atmosphere in which free collective negotiations could occur and providing a means by which remedies could be secured when labor or management deviated from the federal model of appropriate labor-management relations. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981).

While Congress could have imposed criminal sanctions, fines or other penalties, it did not do so. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); Our national labor policy is remedial not punitive. *Consolidated Edison Co. v. Labor Board*,

305 U.S. 197 (1938); *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939). Congress chose not to brand parties who transgress the boundaries of fair labor practice as "outlaws." *NLRB v. American Mfg. Co.*, 351 F.2d 74, 80 (5th Cir. 1965). *See also, NLRB v. Townhouse TV*, 531 F.2d 826, 832 (7th Cir. 1976).

And rightly so. Disputes between management personnel and rank and file workers and their unions are not isolated, "one-shot" business transactions. They are part of the fabric of ongoing relationships in which, despite their conflicts and trespasses, the parties must continue to get along. *Cf. Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 580-82 (1960). The imposition of penal sanctions, which go beyond a straightforward resolution of the dispute or correction of the "unfair labor practice," is antithetical to the peaceful maintenance of the ongoing relationship. Indeed, the fortunes of both are so intertwined that to *punish* one side may, more likely than not, inure to the detriment of the other. *Cf. Consolidated Edison v. Labor Board*, 305 U.S. at 235-38; *Local 57, ILGWU v. NLRB*, 374 F.2d 295, 302-03 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967); *NLRB v. Ship Shape Maintenance Co., Inc.*, 474 F.2d 434, 443 (D.C. Cir. 1972).

Whether punitive sanctions would, in fact, impair industrial peace is beside the point. It is only important that Congress chose to pursue another course. For Wisconsin to debar an offending employer from government contracts does not in any way remedy the underlying labor practices or compensate for injury. It is a mindless flailing out to punish that which Wisconsin has decided is "recidivism." Had Congress chosen to enact punitive sanctions for violations of *its* federal law, it had the power to do so. By creating punitive sanctions, Wisconsin "clearly interfered with the federal scheme." (J.S. App. p. 15).

The conclusion that debarment is contrary to the federal scheme is clear not only from Congress' avoidance of punitive

measures in general, *Republic Steel Corp.*, 311 U.S. at 10, but also from the fact that Congress was asked to provide for federal contract debarment to be invoked by the General Counsel in cases of flagrant or chronic violation and declined to do so. The Labor Law Reform Bill of 1978 (H.R. 8410, S. 2467, 95th Cong. 2d Sess. 30 (1978)) contained a debarment provision. In debating its wisdom, objections to the penal nature of debarment were raised by members of Congress.

> [D]ebarment would be profoundly counterproductive to the goal of S.2467 [Labor Law Reform Bill of 1978] to protect workers' rights because of the simple fact that *debarment would, in many cases, mean the loss of jobs for those employees working on the contract.*

Statement of Sen. Dole, 124 Cong. Rec. S.14,025 (1978) (emphasis added). *See also,* Statement of Sen. Hatch 124 Cong. Rec. S.13,843 (1978); Statement of Sen. Goldwater, 124 Cong. Rec. S.16,178 (1978) (debarment penalizes both employers and employees). The penal nature of Wisconsin's law is further underscored by comparison with the rejected federal legislation. At least that bill in its final form applied only to willful violations of an outstanding Board order. Moreover, it allowed for reinstatement upon accomplishment of the affirmative requirements of the Board's order.[5] *See* Labor Law Reform Act of 1978, S. Rep. No. 95-628, 95th Cong., 2d Sess. 55 (1978).

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[5] In sharp contrast, Wisconsin even penalizes employers for mere "technical" violations of the Act, in which the employer can obtain judicial review of a Board representation determination only by refusing to bargain with the union it has certified. *See, e.g., Gould Inc. Electrical Components Division,* 237 NLRB 66 (1978), *enf'd* 610 F.2d 316 (5th Cir. 1980). Moreover, under Wisconsin law, "any immediate change in behavior doesn't make any difference because it's a three-year duration and it doesn't matter what the Company does in the interim." (Jt. App. pp. 70-71).

Notwithstanding Wisconsin's protestations to the contrary, Congress' refusal to adopt a debarment penalty, does stand as an indictment of Wisconsin's initiative. *Cf. Bus Employees v. Wisconsin,* 340 U.S. at 394-395. In that case Wisconsin claimed, as here (App. Brief, pp. 37-38), that Congress' failure to enact certain provisions in the NLRA hardly abrogates the right of a state to enact such legislation. The Court squarely rejected that argument:

> This proposal, closely resembling the pattern of the Wisconsin Act, was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it.

340 U.S. at 394-95.

Moreover, it should be recognized that Wisconsin and other states (National Governors Association Brief, p.2, n.1) would effectively provide the NLRB's General Counsel with a potent punitive weapon *denied to that office by Congress.* The General Counsel *can* seek Board orders and court enforcement thereof *even where* the employer has chosen to comply. 29 CFR §§ 101.13(b), 101.14 (1983). State debarment actually could be triggered by action of the General Counsel. In the case of Wisconsin, for example, the General Counsel need only decide to pursue charges against an employer, even one who is prepared to comply, through to court enforcement order on three occasions and that employer will be debarred. In a real sense, therefore, Wisconsin has altered the powers of the General Counsel and the legal consequences that that *federal office* can precipitate for violation of the Act.

Finally, the extent to which Wisconsin interferes with the federal scheme is exposed further by a comparison of its treatment of what it has chosen to lable as "recidivism" with the federal definition of "recidivism" and the latter's response thereto.

The NLRB *does* have authority to remedy recidivist activities through enforcement and contempt proceedings (29 CFR § 101.13(b) (1983)) or through appropriate broad remedies in subsequent unfair labor practice cases under § 10(c) of the Act. The Board has done so where employee conduct met its definition of recidivism.

While federal labor policy has never adopted a mechanical definition of "recidivism," it does recognize the concept[6] and imposes additional *remedial* steps to be taken by recidivists. *See, e.g., Labor Board v. Express Pub. Co.*, 312 U.S. 426, 436-437 (1941); *J. P. Stevens & Co., Inc. v. NLRB*, 638 F.2d 676, 688 (4th Cir. 1980).

In *none* of the cases for which Gould was debarred, however, did the Board assert that Gould was a "recidivist" violator upon whom extraordinary remedies should be imposed. Gould's violations were isolated incidents occurring in large and diverse workforces which evidenced no general disregard for fundamental employee rights or a deliberate flaunting of the requirements of the Act. (*See* pp. 4-7, *supra.*)

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[6] The Board and courts, in imposing extraordinary remedies, have identified and defined a "recidivist" labor law violator under the federal scheme. In *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979) the Board held that it will impose a broad cease and desist order:

> *only* when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. (emphasis added).

In *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 11-12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), the First Circuit upheld extraordinary Board remedies where the violations were *flagrant and repeated.* The Fourth Circuit in *J. P. Stevens & Co., Inc. v. NLRB*, 668 F.2d 767, 777 (4th Cir.), *vacated and remanded*, 458 U.S. 1118 (1982), upheld the imposition of extraordinary remedies "only in cases of flagrant, aggravated, persistent and pervasive employer misconduct."

2. The Wisconsin Statutes Interfere With The Exercise Of An Employer's Right Of Appeal And Development Of Federal Labor Policy Under The NLRA.

Despite Wisconsin's stated abhorrence of labor law violators, the impact of the Wisconsin statutes is not against labor law violators *per se,* but *only* against an employer who has tested the correctness of the Board's position in federal courts of appeals. An employer may violate the Act repeatedly, and so long as he acquiesces in the Board's remedies, the Wisconsin statutes do not touch him.

But let him test the Board's decisions in a federal court of appeals and lose, or partially lose, three times within five years and Wisconsin debars him from interstate commerce with it.

Direct interference with, or encumbrance of, the federal right of appeal, not mere labor law violation, is the core of Wisconsin's statutory scheme. Federal courts of appeals have ample power to discipline those who take frivolous appeals and do not need Wisconsin's assistance.

The district court recognized this aspect of the statutes and based its decision, in part, thereon. It held that "[e]mployers who want to appeal from Board decisions will be deterred by Wisconsin's categorical refusal to purchase goods from employers who have three National Labor Relations Board convictions that have been affirmed, in whole or in part, by a federal court of appeals." (J.S. App. 76-77).

The Seventh Circuit, having already found the statute to be preempted because of the penal aspects of debarment, did not accept this additional ground. Its rejection was primarily based upon the rationale that "[t]he possibility of harsher sanctions because of an appeal is not an unheard of event in our system of justice." (J.S. App. p. 33).

We agree with the court of appeals' observation but not the conclusion it drew therefrom. The court of appeals overlooked Gould's point that the statute is offensive not only because of transgressions against due process and equal protec-

tion,[7] but also because it is the *state* which is imposing this "harsher sanction" upon the exercise of a *federal* statutory right of appeal. In other words, the court of appeals missed the extent of the preemption doctrine. Whatever may be said about the constitutionality under the Fifth and Fourteenth Amendments of imposing such a risk burden upon access to federal review[8] it is not the place of the *state* to impose it.

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[7] Wisconsin's rote definition of "recidivism" violates the Equal Protection Clause of the Fourteenth Amendment. In order for a discriminatory classification to survive equal protection scrutiny, it must be rationally related to a legitimate state purpose. The sole purpose advanced by Wisconsin for its "recidivist" classification is to encourage employers to comply with the NLRA. As discussed *infra*, pp. 25-29, this is not a legitimate state interest.

Wisconsin debars entire corporations for the isolated acts of their divisions. This classification discriminates against large corporations which, for legitimate business reasons, delegate the conduct of labor relations to the individual plants or divisions. The proponents of proposed federal debarment recognized the irrationality of such a classification by limiting their debarment bill to "the products or service performed at the particular facility or facilities where the willful violation occurs or the business entity legally responsible for the willful violation." H.R. 8410, 95th Cong., 2d Sess. (1978).

Moreover, Wisconsin's definition is not based on the number or seriousness of unfair practices. It is based solely on the number of appeals lost or partially lost. Thus an employer can commit scores of unfair labor practices so long as judicial review of the Board order is not sought.

[8] In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court held that access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. *Accord, Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). State statutes, which dampen the exercise of First Amendment rights, however slight the inducement to the individual to forsake such rights, in the absence of compelling state interests, are unconstitutional. *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976). And where there is significant impairment of First Amendment rights, the statutes must survive exacting scrutiny.

(Footnote continued on following page)

In *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967) the Court declared Florida's unemployment compensation statute preempted by the NLRA because thereunder an employee who alleged unfair labor practices in connection with a discharge gave rise to a "labor dispute" during which time workers were ineligible for unemployment benefits. As did the district court here, the Court held that such a scheme had the effect of deterring employees from filing charges with the Board and thereby interfered with the NLRA's enforcement scheme. The Court found that employees were left with two choices: File a charge and risk financial injury until the Board's processes were complete or keep quiet and collect the benefits. The Court, therefore, held:

> Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. 389 U.S. at 239.

The similar chilling effect that debarment would have upon the exercise of *employer* rights of appeal under the Act was recognized by Congress during its consideration of proposed NLRA reform.

> The potentially chilling effect is more pronounced in Senate bill 2467 than in any of the other remedies in labor law history. With enactment of this bill, the employer who litigates a charge alleging that he was engaged in a "pattern" of unfair labor practices does not only face the loss of litigation expenses if his defense should prove

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(Footnote continued from preceding page)

Buckley v. Valeo, 424 U.S. 1, 64-65 (1976).

Here the district court concluded that the statutes deter employers from exercising their right to seek judicial review of Board decisions. Wisconsin has advanced no legitimate, let alone compelling, reason for this burden upon the right to appeal decisions. Therefore, the statutes violate First Amendment rights of access to the courts as guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

> frivolous, rather, the vague standards and definitions of the bill confront the employer with the possible loss of the Government contract portion of his business for at least 3 years, plus the time necessary to regain his lost contracts. *This severe penalty would tend to encourage an employer with a debatable defense to settle an unfair labor practice charge because of the uncertainty and seriousness of the penalty. So in the name of labor reform we silence employers who wish to speak their mind in a court of law.*

Statement of Sen. McClure, 124 Cong. Rec. S.16,170 (1978) (emphasis added). *See also,* Statement of Sen. Bartlett, *id.* at S.15,513 "[debarment] is . . . the final deterrent against employers pursuing their rights to contest union claims before the Board and the courts. . . ." *Accord,* Statement of Sen. Hatch, *id.* at S.16,166. *See also In re Sewell,* 690 F.2d 403 (4th Cir. 1982) (State court action by union for tortious contract interference by company president for seeking federal court review of NLRB election certification held preempted due to interference with federal appellate jurisdiction).

Courts of appeals, like the Board, are part of Congress' scheme to enforce the NLRA and determine national labor policy. *See, e.g., Labor Board v. Brown,* 380 U.S. 278, 291-92 (1965). Employers, such as Gould, are faced with the same "Hobson's choice" as the plaintiff in *Nash.* They may acquiesce in Board decisions and continue to do business with the state, or they may seek judicial review and risk the loss of substantial state business.

The Seventh Circuit also reasoned that appellate jurisdiction is not infringed because the Board itself may seek enforcement of its orders and because, if the employer's position has merit, it will likely prevail on appeal (J.S. App. pp. 35-36).

The first observation is irrelevant. As recognized by both the district court and the Seventh Circuit (J.S. App. p. 20 n.7), except in unusual circumstances, not claimed to be present here,

the Board does not seek enforcement of its orders unless the employer refuses to obey.[9] Moreover, the fact that the Board is entitled to seek judicial enforcement does not lessen the inhibition of the exercise of the correlative right by the employer of review and denial of enforcement.

The simple fact is that Congress granted a right of appeal to Board respondents and Wisconsin's law chills its assertion. It doesn't matter how much; Wisconsin simply has no right to do so. *Cf. Nash,* 389 U.S. at 240. The potential for such a deleterious consequence lies at the core of the policy considerations which underpins the preemption doctrine. *Garmon,* 359 U.S. at 246. Here, Wisconsin "burden[s] . . . the operation of [a] constitutional [law] enacted by congress to carry into execution the powers vested in the general government." *McCulloch,* 4 Wheat. at 436.

The contention that those with meritorious grounds for appeal will not be forestalled from pursuing their defenses on appeal, ignores the reality that the proper disposition of a legal dispute is often not that obvious or clear-cut. Reasonable men may differ. If it were not so, our judiciary would have only easy cases, which quite obviously is not the case.[10]

This is particularly so in the field of federal labor law and policy. Congress intended that the Board, like an arbitrator under a labor contract, bring its expertise in labor-management relations to the myriad of situations that it could not have wholly anticipated when it drafted the Act. *Cf. Steelworkers v. Warrior & Gulf Co.,* 363 U.S. at 578. It "fleshes out"

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[9] It is also often true that where the Board does seek enforcement it is because the employer has exercised what amounts to an indirect appeal by refusing to acquiesce in the Board's determination unless and until it has been affirmed by the judiciary. *See* 29 CFR § 101.14 (1983).

[10] *Compare NLRB v. Gould Inc., Switchgear Division,* 638 F.2d 159 (10th Cir. 1980) *with Gould Inc. v. NLRB,* 612 F.2d 728 (3d Cir. 1979).

substantive labor policy on a case-by-case basis. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). This evolutionary process of applying the Act's provisions in light of changing industrial practices, the complexities of industrial life and the Board's cumulative experience in dealing with labor-management relations, is "particularly fitting." *NLRB v. Weingarten, Inc.*, 420 U.S. at 265.

Consequently, the lines of demarcation between what is a fair or unfair labor practice are not always clear. Delineating between those personnel decisions, bargaining tactics or dispute resolution strategems which, in a particular case, are appropriately left to the free play of economic forces versus those which go too far, is very much a matter of judgment and policy and subject to shifts as experience puts its imprint upon the delicate economic balance of labor-management rights. There are, as the district court observed, many " 'gray areas'." (J.S. App. pp. 78-79). It is the primary function of the Board to establish and reshape those parameters if federal labor policy is to remain responsive to current realities. *NLRB v. Weingarten*, 420 U.S. at 265, 267.[11] It is this dynamic process also upon which such punitive enactments would intrude.

Unimpeded access to judicial review is essential in such an administrative framework. The judicial restraint and precedential stability which the courts bring to the process of molding national policy assure a measure of continuity which stands as a bulwark against any unjustified shifts in policy.

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[11] For example, the Board now holds that employers may discharge union stewards for violations of no-strike clauses under circumstances like those of *Gould Inc., Switchgear Division*, 238 NLRB 618 (1978). *See, Indiana & Michigan Electric Co.*, 273 NLRB No. 193 (1985) and *Indianapolis Power & Light Co.*, 273 NLRB No. 211 (1985).

Seafarers, Local 777 v. NLRB, 101 LRRM 2628 (D.C. Cir. 1979).

B. Wisconsin's Statutes Do Not Serve Any Legitimate Non-Labor Interest Deeply Rooted In Local Concern And Responsibility

Against the federal interest in uniform labor policy, and the degree of potential interference therewith, may be balanced the legitimate *non-labor* interests of the state which its enactment purports to serve. *Farmer v. Carpenters,* 430 U.S. 290 (1977). This entails a weighing of the local non-labor interest in the conduct the state seeks to regulate. State regulation of arguably protected or prohibited conduct will be tolerated where the conduct being regulated is merely of peripheral concern to the Act or is of unusually deeply-rooted local concern. *Brown v. Local 54,* 82 L. Ed. 2d at 383; *Belknap, Inc. v. Hale,* 463 U.S. at 498; *Garmon,* 359 U.S. at 243-244.[12]

In the instant case, however, there is *no* legitimate non-labor relations-related interest *to be weighed.* As both the district court and the court of appeals observed, and as Wisconsin has conceded throughout, its only professed interest

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[12] The types of state interest which have survived this balancing test include the protection of property rights and public safety under trespass laws where the employer has no NLRA recourse, *Sears v. Carpenters,* 436 U.S. at 207 n.44; the protection of the individual's reputation, *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966); the protection of the state's public safety interests against violence and threats of violence, *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131 (1957); and protection of the individual from intentional infliction of emotional distress not caused solely by conduct governed by the NLRA. *Farmer v. Carpenters,* 430 U.S. 290 (1977).

Not saved from preemption, however, are state laws which regulate labor conduct *as labor* conduct in order to achieve some other state purpose. *Bus Employees v. Wisconsin,* 340 U.S. 383 (law prohibiting public utility employees strikes, directed at preservation of public utility service *not* at maintenance of sound labor relations held unconstitutional). *Accord, Bus Employees v. Missouri,* 374 U.S. 74 (1963).

was and is to encourage compliance with federal labor law and to influence private conduct to that end (R. 22 pp. 11-12, 18; R. 21 p. 2; *see also* J.S. App. pp. 27 n.9, 73-74).

In the face of this major shortcoming in its argument against preemption, Wisconsin now tries to divert attention from it.

First, the Attorney General, suggests that the Wisconsin statutes are reflective of its citizens' "deeply-rooted" revulsion at labor law "miscreants." (App. Brief, p. 31). This, of course, is no more a *non-labor* interest than the state's desire to discourage federal law violation in general. Indeed, to accept this bit of sophistry would be to eviscerate the preemption doctrine. Presumably every piece of local legislation can be said to be the result of some local interest in its enactment.

Moreover, such a claim of "interest" ignores the fact that Congress determined that the "fostering" of labor conduct consistent with the NLRA is a *national* and not a local interest. 29 U.S.C. §§ 141(b), 151. Congress enacted the NLRA and entrusted its enforcement to the Board, in part, because it feared that the states were unable to:

> provide an informed and coherent basis for stablilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.

Motor Coach Employees v. Lockridge, 403 U.S. at 286.

Wisconsin's "revulsion" at Gould as a "miscreant," and its Pavlovian response thereto, is the very form of "local attitude" toward labor controversies which Congress sought to override in enacting a uniform federal labor law. *See, e.g., Garner v. Teamsters,* 346 U.S. at 490.

Second, Wisconsin and certain of its *amici* suggest that the state has a deeply-rooted local interest in its purchasing decisions. This tack, however, confuses the means of regulation with the end objective of that regulation. As the *Garmon* Court

noted, "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation." 359 U.S. at 243. *Garmon* and its progeny will consider the state's interest "where the *regulated conduct* touched interests so deeply rooted in local policy and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244 (emphasis added).

The Wisconsin-regulated conduct here is not the state's purchasing activities; it is the employer's labor relations conduct which Wisconsin seeks to "influence" and "encourage." If the proper focus of inquiry was the state's interest in its mode of regulation, then that local interest would always exist by definition. States always have a deeply-rooted interest in the administration of their unemployment compensation statutes and the payment of benefits thereunder, *cf. Nash v. Florida,* 389 U.S. 235; in their injunction statutes, *cf. Garner* 346 U.S. 485; in their tort laws, *cf. Allis-Chalmers Corp. v. Lueck,* 85 L. Ed. 2d 206 (1985) and in any other laws enacted pursuant to their police power. In *Garmon,* for example, it would have been of no value to observe that the state has an interest in its civil damage laws.

Such tautologies are unavailing. Wisconsin's law is, by its very terms, concerned with labor conduct which is the subject of federal regulation. By its very structure, the activities to be addressed by Wisconsin and federal law, "private [employer] conduct", are coterminous. *Wisconsin seeks to "influence" the very same conduct but by a very different device.*

The proper question is whether the protected or prohibited employer conduct has impact or consequence *within* the state in which the state has a legitimate *non-labor* interest. The legitimacy requirement is not mere verbiage; rather, it requires, at least, that the conduct must have some intrastate consequence upon non-labor matters which it is the state's ac-

knowledged function and responsibility to regulate on behalf of its citizens. *Cf. Sears v. Carpenters,* 436 U.S. at 207; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131.

Unless this can be established, there is no countervailing area of local interest to balance against federal interests. At least in *Garmon,* for example, the union's injurious picketing activity occurred in California. Likewise, in the principal preemption cases relied upon by Wisconsin below, local conduct, was at issue. *See, e.g., Massachusetts Nursing Ass'n. v. Dukakis,* 726 F.2d 41 (1st. Cir., 1984) (Statutes aimed at control of local hospital costs), *Amalgamated Transit Union, Div. 819 v. Byrne,* 568 F.2d 1025 (3d Cir. 1977) (*en banc*), (Statutes aimed at controlling local transportation costs) and *Golden State Transit Corp. v. City of Los Angeles,* 754 F.2d 830 (9th Cir.), *cert. granted,* ____ U.S. ____, 85 L. Ed. 2d 159 (1985) (regulation of local cab companies) In those regulatory areas in which state enactments have weathered preemption challenges, the conduct had obvious local consequences of a non-labor relations nature. *See, e.g., Sears v. Carpenters,* 436 U.S. 180; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131.

Here, there is nothing. No alleged Gould unfair labor practice occurred in Wisconsin. None of the Gould divisions involved, nor Gould itself, is based in Wisconsin; in fact, the divisions involved in the unfair labor practice charges did not even do business with Wisconsin. No Wisconsin citizen has been shown to have been injured by Gould's conduct in *any* way, let alone in his person or property for which the state would normally be expected to provide a remedy. None involved local instrumentalities or utilities in which Wisconsin might have a quasi-governmental interest. *Cf. Bus Employees v. Missouri,* 374 U.S. 74 (1963).

Gould does not mean to suggest that mere identification of some local consequence will suffice to survive a preemption challenge, but it is, at least, the minimum "ante" to get into the game.

II. WISCONSIN'S RELIANCE UPON THE MARKET PARTICIPANT EXCEPTION TO DORMANT COMMERCE CLAUSE RESTRICTIONS OF STATE ACTION IS MISPLACED.

While Wisconsin makes some effort to save its blacklisting law under traditional preemption analysis, its principal effort is an attempt to have this Court declare a "market participant" exception to the preemption doctrine.

The market participant exception, however, is a creature of the dormant Commerce Clause's restriction upon protectionist trade legislation of the states which burden interstate commerce. While its "precise contours . . . have yet to be established," *South-Central Timber Development, Inc. v. Alaska,* ____ U.S. ____ 81 L. Ed. 2d 71, 80 (1984), it is clear that the Court has considered it and its ramifications only within the boundaries of that limited protectionist arena. *Id.*

However, Wisconsin's proposed extension of this narrow exception from the dormant Commerce Clause to the Supremacy Clause ignores fundamental differences in the implications and dictates of federalism where the area of conflicting policy under scrutiny is one in which Congress has chosen to adopt an extensive and complex regulatory scheme, as opposed to areas which it has declined to enter. Moreover, as the instant case demonstrates, loosed from its precise constitutional and conceptual moorings, the market participant exception represents a dangerous device for interference with federal law and policy.

Although the Commerce Clause is an affirmative grant of power to Congress to regulate interstate commerce, it has long been recognized as a self-executing limitation on the power of the states to enact laws burdening such commerce. *South-Central,* 81 L. Ed. 2d at 76 and cases cited therein. Under its aegis, the Court has struck down a wide variety of state laws which erect trade barriers for the protection of local business enterprises at the expense of interstate commerce. *See, e.g.,*

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

The market participant exception suffers such parochialism at the expense of interstate trade where the state is acting solely as a buyer or seller of goods and services. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *United Bldg. Trades Council v. Camden*, ____ U.S. ____, 79 L. Ed. 2d 249 (1984).

The exception's fundamental premise is that the Constitution and the policies of the Commerce Clause accommodate the desire of a state *to favor its local residents* in its own business dealings in the absence of congressional action.

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and *exercising the right to favor its own citizens over others.*

Alexandria Scrap, 426 U.S. at 810 (emphasis added).

It is critical to realize that the limited objective and impact of such legislation, which this Court has declared constitutionally tolerable, circumscribes and defines the legitimate state interest which may be served by such market participatory discrimination. A state is thus permitted, despite the dormant Commerce Clause, to prefer "its own residents". *South-Central Timber*, 81 L. Ed. 2d at 83. It may "structure relations exclusively with its own citizens," thereby "solving local problems and distributing government largesse." *Reeves, Inc.*, 447 U.S. at 441. State revenues may be spent in such market transactions to favor or benefit "those who fund the state treasury and whom the State was created to serve."

> *Such policies ... reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.*

Id. at 442. (emphasis added).

Wisconsin, however, does not even try to claim that the statutes are intended to economically benefit its citizens (App. Brief, p. 24). Rather, it would have the Court establish the "Market Participation Doctrine" as a "carte blanche to impose *any* conditions that the State has the economic power to dictate." *South-Central Timber,* 81 L. Ed. 2d at 83 (emphasis added). It should be recognized that outside the context of the dormant Commerce Clause's consideration of state protectionism, the exception's foundation in the state's legitimate interest in favoring its own citizens in its dealings, is utterly lost. Consequently, the inherent limitations upon the exception are also lost.

Once applied outside the dormant Commerce Clause, the state may seek to achieve objectives that have nothing to do with favoring those who fund its treasury. Accepted by the Court as a *shield* protective of a state's paternalistic attitudes toward its own taxpayers, it would become a *sword* with which the state may cut a path toward any goal. With it, the state may pursue its own ends in areas which are governed by federal law and which are otherwise foreclosed to it. As Wisconsin's proffered new exception to the Supremacy Clause, the market participation doctrine would permit states to do indirectly—through the exercise of their considerable spending power[13]—that which they are not permitted to do directly. *Cf. Elrod v. Burns,* 427 U.S. 347, 361 (1976) (plurality opinion).

If permitted to run its course, the logical terminus of Wisconsin's argument is that the state, in the exercise of its contract power, is, as Wisconsin itself suggests, "unrestricted." Because "state sovereignty is implicated", the state is free to "fix the terms upon which it will make needed purchases." With sovereign contract power as its premise, unfettered from the

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[13] In 1984, state and local governments spent $191.3 billion on goods and services in the private sector. U.S. Commerce Department, Bureau of Economic Analysis, Vol. 65, *Survey of Current Business,* No. 4 p. 13 (April, 1985).

same constraints of the Supremacy Clause applicable to other forms of state action, local government is free to seek any goal and influence conduct toward any model which conforms to that state's "moral and social policy choices" (App. Brief at 30). Indeed, Wisconsin tells us a sovereign must have the "prerogative" to participate in the market in an *inefficient* manner to pursue its constituencies' choices. *Id.* (emphasis added).

But if that were true, then it would have the sovereign right to pursue moral and social policies hostile to, as well as consistent with, federal policy. *Cf. McCulloch v. Maryland,* 4 Wheat. at 428, 432-33. In short, if Wisconsin is free to debar labor law violators, then Louisiana is free to refuse to purchase from businesses whose employees are represented by unions which have committed violations of law or whose employees are unionized at all. Certainly, Louisiana is entitled to its own moral and social policy choices. If Wisconsin may debar for three violations, then Maryland is free to use its sword to smite those who have committed a single violation of the Act or an isolated labor contract breach. *Cf. Allis-Chalmers v. Lueck,* ____ U.S. ____ 85 L. Ed. 2d 206 (1985).

State spending power is not unrestricted. It is subject to the same limitations of the Constitution, *including the Supremacy Clause,* as any other form of state action. *Cf. McCulloch v. Maryland,* 4 Wheat. at 432-433.

While it is true that in *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 127 (1940), the Court stated, in *dicta,* that government contract power is "unrestricted", both prior and subsequent cases have held otherwise. In *Perry v. United States,* 294 U.S. 330, 348 (1935), the Court stated that the state's power to make contracts is necessarily subject to the dominant power of Congress. Likewise, in *Rosado v. Wyman,* 397 U.S. 397, 420 (1970), and in *King v. Smith,* 392 U.S. 309, 333-34 (1968), the Court clearly implied that a state may not spend its funds in a manner which violates any provision of the Constitution.

In *Lefkowitz v. Turley,* 414 U.S. 70 (1973), the Court held that states could not debar contractors because they had exercised their constitutional rights.[14] *See also, Sanitation Men v. Sanitation Commissioner,* 392 U.S. 280 (1968) and *Gardner v. Broderick,* 392 U.S. 273 (1968).

Elrod v. Burns, 427 U.S. at 357, further limited the state proprietary power. In *Elrod,* the plaintiff was discharged because he refused to make political contributions. Elrod contended that because public employment is a "benefit" and not a right, the benefit may be denied for any reason. The Court squarely rejected this argument:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely . . . one such impermissible reason: *The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly* . . . This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a privilege. 427 U.S. at 360-61 (emphasis added).

In *Fullilove v. Klutznick,* 448 U.S. 448 (1980) (plurality opinion), the Court was faced with the question of whether Congress could exercise its proprietary power to create minority set-asides in the awarding of government contracts. *Perkins v. Lukens Steel Corp.* was not even mentioned. Rather, the Court recognized that Congress' own spending power is limited by the equal protection component of the Fifth Amendment's Due Process Clause. 448 U.S. at 480. As Justice Stewart, dissenting, noted at 448 U.S. 526-27:

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[14] Amici, National Governors' Association, *et al,* (Brief p.6 n.2) cite the New York statute declared unconstitutional in *Lefkowitz* as support for Wisconsin's claim that its statutes are constitutional.

> [I]n the exercise of its powers, Congress must obey the Constitution, *just as the legislatures of all the States must obey the Constitution in the exercise of their powers. (emphasis added).*

A state's spending power, like its other powers, must be exercised in a manner consistent with the Constitution and, under the Supremacy Clause, the laws of the United States. The preemption doctrine and its balancing tests have been developed and refined by this Court to protect federal law and policy from state interference while respecting legitimate state interests where such respect will not frustrate the dominant federal purpose. It insures consistency. It is fully applicable to any state action "regardless of the mode adopted". *Garmon,* 359 U.S. at 244.

The market participant doctrine, first ennunciated in *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 entails no contravention of these constitutional limitations on state spending power. *Alexandria Scrap,* for example, concerned the question of whether a state, when not attempting to regulate conduct, could spend its tax dollars as it saw fit to remove abandoned automobiles from its road ways. The statute in question paid a bounty for hulks. However, a hulk turned over to a licensed scrap processor located in Maryland did not require the same documentation to receive the bounty as did a hulk turned over to a licensed scrap processor whose plant was not in Maryland.

The plaintiff challenged the statutes on Commerce Clause and equal protection grounds. The plaintiff claimed, under the Commerce Clause, that the law burdened interstate commerce in that hulk suppliers would turn over the hulks to plants located in Maryland rather than to plants located outside of Maryland. The Court conducted the traditional preemption analysis. It determined that the federal purposes underlying the Commerce Clause's prohibition against state interference with interstate commerce, i.e., prevention of discriminatory taxes

and tariffs, were not implicated by a state's decision to do business with its own citizens when acting in the market place.

The Court concluded that while the right to engage in interstate commerce is not a gift of the state and, therefore, the state generally may not restrain it or regulate it, the Commerce Clause, in the absence of congressional action, does not prevent the state from entering the market and restricting its own trade to its own citizens or businesses within the state. *Id.* at 806-10. *Accord, Reeves, Inc. v. Stake,* 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204 (1983).

Thus, the market participation doctrine proceeds from the view that *"participation" in* the market is fundamentally different from *"regulation" of* the market. *A fortiori,* using a market and one's buying power therein, to regulate conduct outside that market and, indeed, having nothing whatsoever to do with that market, is something different altogether. *South-Central Timber,* 81 L. Ed. 2d at 83. In those dormant Commerce Clause cases in which it has been accepted, the states were not attempting by such local favoritism to control or reform private conduct having nothing to do with the market transaction in which the state was engaged. The end goal was *local favoritism;* the states had no other agenda or objective. Here, however, Wisconsin asserts that its goal is *not* local favoritism (App. Brief, p. 24). Rather it *does* seek to control, reform or influence private conduct outside of the transaction and the market in which it occurs. Consequently, the asserted distinction between mere "participation" and "regulation" breaks down.

When the spending power has been used to control and fashion conduct, it is a very potent and effective form of regulation.[15] It is a form of governance. Even under the

[15] The federal government has used its contract power extensively to regulate a variety of employment relations-related matters.

(Footnote continued on following page)

dormant Commerce Clause, this Court has recognized, albeit in another vein, that the state may not use its contracts to effectively regulate in a manner at odds with the Constitution.

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

South-Central Timber, 81 L. Ed. 2d at 83.

In the final analysis, "participation" which is designed and intended to regulate conduct is the consequential equivalent of direct regulation. Private conduct *is* governed by action of the sovereign. And when the focus of inquiry shifts to the Supremacy Clause, categorization of a state's effort to govern conduct as a "regulation" or mere "participation" is a particularly unhelpful exercise. In those cases where Congress has chosen to establish an integrated federal regulatory scheme, it is not to be interfered with "regardless of the mode adopted." *Garmon,* 359 U.S. at 244. "It is the substance of the transaction rather than the label attached to it," that should govern, *South-Central Timber,* 81 L. Ed. 2d at 84 n. 11, for the Constitution is concerned with essence, "not mere form." *Holmes v. Jennison,* 14 Pet. 540, 573 (1840).

In defense of its market participant theory, Wisconsin argues that it should be free to discriminate against contractors on any basis it chooses just like any private trader.

While the private trader concept has been utilized, principally by way of analogy, to justify the market participant exception to the reach of the dormant Commerce Clause, *Reeves, Inc,* 447 U.S. at 438-39, it is without validity in the case

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(Footnote continued from preceding page)

See, e.g., Davis-Bacon Act (40 U.S.C. § 276a *et seq.*), Walsh-Healy Act (41 U.S.C. § 35 *et seq.*), Rehabilitation Act of 1973 (29 U.S.C. § 793), and Executive Order 11246.

at bar. Wisconsin is not acting at all like a private trading partner in its own legitimate economic self-interests or those of its citizens. *Cf. Reeves, Inc.* 447 U.S. at 450 (Powell, J., dissenting). Here, as has been noted, Wisconsin pursues a regulatory agenda unrelated to the marketplace in whose freedoms Wisconsin seeks to cloak itself.

Outside the narrow scope of state-as-market participant's legitimate favoritism of its constituency, the state simply is not a private enterprise. A state, unlike a private enterprise, is not just one "player" on the stage of "shifting economic arrangements" of the private sector economy. *See Kovacs v. Cooper,* 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Rather, it is a coordinate element in the system established by the Constitution for governance of the federal union. *National League of Cities v. Usery,* 426 U.S. 833, 849 (1976). *Accord, Garcia v. San Antonio Metropolitan Transit Authority,* ____ U.S. ____, 83 L. Ed. 2d 1016, 1031 (1985).

> The fact that local government may enter the domain of private enterprise . . . does not put it in the class of private business. . . . [L]ocal government exists to provide for the welfare of its people, not for a limited group of stockholders.

New York v. United States 326 U.S. 572, 593 (1946) (Douglas, J., dissenting).

Thus, even in the simple exercise of its proprietary functions, it must act for the benefit of its citizens as part of our federal system of government. And unlike a private trader, it must carry out these functions in a manner consistent with the Constitution. Consequently, a state, unlike General Motors, constitutionally may not condition award of its contracts upon the waiver of constitutional rights, *Lefkowitz v. Turley,* 414 U.S. at 70; unlike General Motors, may not decline to do business with Republicans or Democrats, *cf. Elrod v. Burns,* 427 U.S. at 357; *United Public Workers v. Mitchell,* 330 U.S. 75, 100 (1947); and unlike General Motors, may not condition employ-

ment upon the taking of a loyalty oath, *Wieman v. Updegraff*, 344 U.S. 183 (1952).

Nor may the state, unlike General Motors, act contrary to any other provision of the Constitution, including the Supremacy Clause. Unlike General Motors, the people of the various states "ordain[ed] and establish[ed]" the Constitution of the United States and the states must look to that Constitution for definition of their proper role in our federal system, vis-a-vis each other and the federal government.

Wisconsin claims, citing *Reeves v. Stakes, Inc.*, 447 U.S. at 439, that because market participant decisions are "politically charged," whether it may debar labor law violators is "better suited for Congress than this Court" (App. Brief p. 27).

Gould could not agree more. Congress has made the "politically charged" decision that debarment and other penal sanctions are inconsistent with the remedial purposes of the NLRA. It is not for the states to act contrariwise. *Cf. Bus Employees v. Wisconsin*, 340 U.S. at 394-95.

Amicus, AFL-CIO's argument is somewhat more subtle, but no more persuasive upon analysis. It does not claim, as does Wisconsin, that the state may pursue any goal as a market participant free from Supremacy Clause restraint. Amicus does urge, however, that Wisconsin's participation differs from regulation in three respects which, it contends, are germane to preemption analysis.

But, they are irrelevant or, at least, do not justify a different result.

Amicus argues that while nonregulation cannot fairly be said to constitute support of an unfair labor practice, contracting with the law violator does constitute support of illegal activity (AFL-CIO Brief at 14). By dealing with the violator, it may "enable him to profit from his misdeeds." (AFL-CIO Brief at 24). A position of neutrality, asserts AFL-CIO, does not exist.

Of course, a position of neutrality *does* exist. If the state wishes to remain neutral in regard to labor-management relations disputes, it need only divorce itself from such concerns when making its purchasing decisions.

Moreover, there is a basic fallacy inherent in this contention, as the instant case demonstrates. By the time of the debarment, there was no evidence that Gould was engaged in any unfair labor practices anywhere, in any division. Each had been remedied in conformance with the Board's order or as modified by the courts. There were simply no unfair labor practices for the state to be "associated with." Given the scope and structure of the Wisconsin statute, this would be true in virtually every debarment case.

Even if that were not the case, however, the state's neutrality is not the issue. Assuming *arguendo* that it is inconsistent for Congress to have outlawed certain practices but yet not debar those who commit them, Congress is entitled to enact an arguably anomalous legislative scheme consistent with its own judgments. It is entitled by the Constitution to pursue national policies in an area committed to its governance free from interference by states which may reach a different judgment.

The second respect merely restates the obvious that the exercise of state contract power does not bind private parties who may *theoretically* choose not to deal with the state. Be that as it may, the contract power is a potent means of regulation. In fact, as the AFL-CIO itself observes, contract conditions are often adopted for the "very purpose" of affecting behavior and "may have a more powerful effect on the conduct of private parties than even a criminal law." (AFL-CIO Brief at 9). In other words, the intrusive effect of state spending restrictions has the potential to exceed so-called direct forms of regulation.

Third, Amicus observes that the statutes create no state judicial or administrative system for state policy in the labor

context. But this fact, as the court of appeals noted, underscores the penal nature of the statute which has been found inimical to national policy. Moreover, it ignores the *de facto* administrative power which such state enactments give to the NLRB's General Counsel.

While such factors may serve in the AFL-CIO's thinking as a basis for a "clear intuitive difference in degree" between market regulation and participation (AFL-CIO Brief at 9), these observations simply beg the proper questions: Does state debarment of federal labor law violators interfere with the *purpose* of Congress behind its statutory scheme and, if so, to what degree? Or does the state have such a deeply-rooted local concern in the conduct to be governed that it cannot be said that the Congress *intended* to deprive them of the power to act?

The Court has recently noted, the purpose of Congress is the "ultimate touchstone" of preemption. *Metropolitan Life Insurance,* 85 L.Ed. 2d at 745. Yet neither Wisconsin, nor its amici, have utilized a single paragraph of their scholarly briefs to consider Congress' purpose in eschewing penal sanctions and providing ready access to the federal appellate judiciary, let alone explain how Wisconsin's statutes do not interfere with that purpose.

They do not because they cannot.

Rather, they propound esoteric theories in an effort to have the Court create exceptions to *Garmon* or proclaim that *Garmon* is not adequate. And even in these efforts, they cannot agree.

The inquiries dictated by *Garmon,* however, are broad indeed, broad enough to consider both the federal interest and the state interest, if any, in all their dimensions and to give each its proper weight. *Garmon* and its progeny recognize that states often have a legitimate local interest in aspects of conduct regulated by the NLRA. These cases demonstrate that the Supremacy Clause is flexible enough to accommodate such local interests. But the Court's decisions also affirm the primacy

of federal law in no uncertain terms. The state and federal governments are not equals whose respective interests in every field must both be served. *McCulloch v. Maryland,* 4 Wheat. at 435-36. Where state law interferes with the federal scheme it must fall "regardless of the mode adopted." *Garmon,* 359 U.S. at 244.

Contrary to Appellants' and *amici's* contentions, *Garmon* is particularly instructive in this case, for its facts raised similar considerations and issues. There, the question was whether the Supremacy Clause prohibited California from merely providing the additional remedy of damages for picketing which was assumed to be an unfair labor practice for the sake of the majority's analysis. Damages (like debarment) for engaging in prohibited conduct are not available under the Act. Thus, the question arose whether it was permissible for the state to provide compensation for unlawful conduct under its civil damage laws which the Board could only restrain. This Court forcefully answered the question.

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. *Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.* Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. . . . In fact, since remedies form an ingredient of any scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

Id. at 246-47 (emphasis added).

The reasoning which informed the *Garmon* Court can be transferred virtually wholesale to this case. Debarment is also "a potent method of governing conduct and controlling policy."

And, in Wisconsin's case, it was admittedly "designed to be." Likewise, since debarment has been withheld from the Board by Congress, to permit Wisconsin to invoke such a sanction "only accentuates the danger of conflict."

Whether the Court chooses to recognize some relevant distinction between participation and regulation for Supremacy Clause purposes, the potential for interference with the congressional purpose behind its federal labor policy must remain the touchstone of the preemption doctrine. Here, that interference is pernicious and pervasive; the state's legitimate interest nonexistent. Accordingly, preemption is appropriate.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(12)

No. 84-1484

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Appellants,

v.

GOULD INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 84-1484

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al.,

Appellants,

v.

GOULD INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT

Wisconsin clearly meets the definitional test of market participant. It directly participates in the market. It chooses a trading partner for the immediate transaction. The NLRA, not

Wisconsin, prescribes appellee's labor relations conduct.

Wisconsin does not claim immunity from constitutional scrutiny as a market participant. The issue is whether Congress has regulated this proprietary choice, not whether it could.

Wisconsin has not violated appellee's first or fourteenth amendment rights. It does not impair appellee's right of access to court: the loss of a customer because of unsuccessful appeals does not obstruct the right of appeal. Awaiting the outcome of the appeals process assures the reliability of the determination of NLRA recidivism. The formula of three violations in five years rationally sets a minimum threshhold for choosing any company as a trading partner.

The NLRA does not preempt. The state is here qua consumer. The NLRA does not proscribe these consumer choices in either the public or private sector; it protects them. Congress has not discriminated by permitting private companies but not the states to choose whether to boycott NLRA recidivists.

Appellee's argument assumes Congress discriminated against the states. Further, its argument succeeds only by ignoring the state's status qua consumer or proprietor. Hence, Wisconsin's consumer choice not to deal with appellee is neither a regulatory burden on its appeal rights nor an addition to the NLRA regulatory remedies.

If the economic consequences of these consumer and proprietary decisions do interfere with the flow of commerce or smooth labor relations, an unlikely

event, Congress is capable of regulating it. It has not done so.

This Court already has held that state proprietary decisions cannot interfere with congressional regulation. United Building and Construction Trades Council v. Mayor of Camden, 104 S. Ct. 1020 (1984). The spending power cases show that proprietary decisions are not regulations. Thus, the real question is whether Congress has regulated proprietary and consumer choices of this sort.

It has not. Even appellee appears to admit that General Motors could make this same choice without offending the NLRA. Therefore, Wisconsin can.

Further, the secondary boycott cases show that the NLRA intends to preserve the freedom of choice of traders, even

states, to do business with each other and as consumers to boycott employers.

Given these principles, appellee's burden is to show that Congress intended to discriminate against states qua consumer and proprietor.

The failure of Congress to debar NLRA recidivists from federal contracts does not show discrimination. It does not "regulate" rights of other consumers and proprietors. It is not an unmistakable withdrawal of a sovereign attribute. Legislation that fails to pass seldom is meaningful of anything, especially here: the particular proposal was a small part of a large NLRA overhaul that failed only by filibuster.

There being no congressional regulation of consumer and proprietary choices in the NLRA, preemption is impossible. Preemption assumes competing

state and federal regulation. But there is no federal regulation of proprietary choices. And there is no state regulation: there is a state proprietary choice.

Preemption could be found only if this Court expands the doctrine in two respects: (a) to reach previously unregulated proprietary and consumer choices of states (but not others) and (b) to insulate NLRA employers from economic boycotts for its recidivism, but only if done by states. There is no basis in the NLRA for this unprincipled expansion.

Even if the boycott is sufficiently regulatory to bring it within traditional preemption law, the controversies in the two forums are not identical. The NLRB cannot order Wisconsin and Gould not to do business with each other. Wisconsin

does not grant employes any relief from unfair labor practices.

This dispute is uniquely for the Congress. It has not clearly ousted the states from this kind of activity. It can address the problem, if it thinks there is a problem.

ARGUMENT

I. Wisconsin Acts As A Market Participant

A. Wisconsin does no more than choose a trading partner

Appellee takes no issue with Wisconsin's contention that it meets this Court's definitional test for market participant status, viz., the "'single inquiry [of] whether the challenged "program constitute[s] direct state participation in the market."'" White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 208 (1983). Nor

does it doubt that Wisconsin acts to "determine the parties with whom it will deal," White, 460 U.S. at 218, 221-22 (White and Blackmun, JJ., dissenting), that its decision is a "refusal to deal with particular parties," South-Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237, 2246 (1984), that Wisconsin's role in the market is "to supply its own needs," Reeves, Inc. v. Stake, 447 U.S. 429, 452 (1980) (dissenting opinion), nor that its statute addresses the purchases needed only for its own "end use." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 824 (1976) (dissenting opinion). Thus, Wisconsin meets the test of a market participant.

Nor does appellee directly challenge this Court's rule that the states have the same liberty of contract rights as a

private entity, simply as a matter of "[e]venhandedness." Reeves at 439.

However, appellee does assert that (1) unlike General Motors, Wisconsin is subject to various other constitutional inhibitions such as the first, fifth, and fourteenth amendments (Br. at 33), and (2) a state may not use its market participant rights to regulate conduct outside the market. (Br. at 35, 37.)

The first proposition is conceded. But it is unhelpful to analysis. The act is market participation even if it is subject to other constitutional restraints.

The second proposition is equally unhelpful. It begs the questions whether Wisconsin's act "regulates" and whether it regulates "outside" its market.

Wisconsin focuses on the immediate transaction of selecting a trading partner. That is the market.

So long as Wisconsin deals only with the "immediate transaction" of selecting a vendor, the "effect of regulating employment" is irrelevant. Wunnicke, 104 S. Ct. at 2244. And the "immediate transaction" need not be limited to furthering economic protectionism. This Court has not upheld local favoritism because it likes parochialism or its ripple effect on other interests, but because the state has "greater interests as a 'private trader' in the immediate transaction ...." Id. at 2246.

Appellee would divert attention from the immediate transaction. It argues that, even if Wisconsin fits this Court's definitional test of a market participant, it has exceeded its intended

scope because, by boycotting NLRA recidivists, Wisconsin "impose[s] conditions ... that have a substantial regulatory effect outside of that particular market." Wunnicke, 104 S. Ct. at 2245-46.

But a boycott imposes no conditions. It regulates nothing. It prescribes no rules of permissible or impermissible labor relations conduct. It refuses to trade.

Basing the boycott decision on compliance with federal regulation remains a trading partner decision, not regulation of what is permissible in labor relations. See amicus AFL-CIO brief at 21. Like Maryland in Hughes, Wisconsin is "a purchaser ...; Alaska, on the other hand," imposed a downstream trading choice for its purchaser: "if he buys timber from the State he is not free

to take the timber out of state prior to processing." Wunnicke, 104 S. Ct. at 2244.[1/] The only market Wisconsin controls is its own decision from whom to buy its goods to meet the needs of the state. Appellee remains free to make its own trading partner choices. The NLRA, the NLRB, and the federal courts -- not Wisconsin -- prescribe appellee's labor relations conduct.

1/ The amicus NLRB similarly obscures the fact that the market is that of choosing a trading partner. See its brief at 25 n. 18. Wisconsin's boycott of the recidivist's products, even when distributed by another, remains confined to the choice of selecting a trading partner. The offensive portion of Alaska's scheme, in contrast, was to "restrict the post-purchase activity of the purchaser, rather than merely the purchasing activity." Wunnicke, 104 S. Ct. at 2246. Wisconsin controls only its own purchasing activity. As the dissent stated in Reeves at 450: "In procuring goods and services for the operation of the government, a State may ... remove itself from the reach of the Commerce Clause."

Equally diverting is appellee's suggestion that the boycott is a regulation because it hopes to spawn compliance with federal regulation. But in no way is a boycott a "regulation." The argument evades this Court's rule that the single point inquiry is whether the program constitutes direct state participation in the market. White at 208.

This selection decision, originating in the perceived impropriety of spending tax dollars to enable law violators to flourish, does not lose its market participant character because it also hopes to positively affect law-abiding conduct. Boston's decision, to hire contractors with resident employes only, did not lose its market participant character because it impacted on the businesses and hiring practices of out-

of-state contractors. White. Maryland's decision, to subsidize local dealers, did not lose its character despite the consequence of reducing the flow of commerce. Hughes. South Dakota's decision, to sell cement only to its residents, did not lose its character despite the result of increasing prices and cutting off trade. Reeves. The states' programs addressed the immediate transaction, as here.

The spending power cases illustrate the fallacy of appellee's premise that a market participant decision is invalid if it influences the conduct of others. Although the state could not constitutionally prevent an abortion, it could choose not to fund it, "'thereby influencing the woman's decision ....'" Harris v. McRae, 448 U.S. 297, 314 (1980). Also see Oklahoma v. United

States Civil Serv. Comm., 330 U.S. 127, 143-44 (1947) (Congress could require a state to remove employes in federally funded jobs for engaging in political activity, though it could not impose the requirement directly). Cf. Fullilove v. Klutznick, 448 U.S. 448, 473-74 (1980) (spending power may induce conduct).

Consequently, Wisconsin's market participant act is not regulatory. It concerns direct state participation in the market and the immediate transaction of choosing a trading partner.

> While the line between governmental and proprietary function is none too sharply drawn ... , one principle remains fixed: the letting of public contracts, particularly those providing for internal needs of government, is a proprietary function.

American Yearbook Company v. Askew, 339 F. Supp. 719, 721 (M.D. Fla.), aff'd. without opinion, 409 U.S. 904 (1972).

B. Wisconsin has not violated the first or fourteenth amendments

Appellee contends Wisconsin has violated its first amendment right of access to court by chilling its decision whether to appeal an adverse decision of the NLRB. (Br. at 20 n. 8.) Wisconsin, of course, does not boycott anyone for the act of appealing. The fact that a result of the appeal may be appellee's loss of a customer no more obstructs the appeal than the refusal to pay for an abortion obstructs the abortion. See Harris v. McRae, 448 U.S. at 316 and n. 19.

For equal protection arguments, appellee asserts the boycott decision is not rationally related to a permissible state objective: it does not address the number or gravity of NLRA violations,

only the results after the appeals process, if any; it operates uniformly on all companies regardless of size or divisional structure; and the purpose of promoting compliance with the NLRA is not a permissible state purpose. (Br. at 20 n. 7.)

Wisconsin could have scaled the violations in relation to the various factors appellee mentions. But its uniform selection of three violations, after the appeals process is exhausted, rationally could be seen as setting a minimum threshold for any company regardless of size and structure, above which Wisconsin would look for a different trading partner. And awaiting the outcome on appeal assures the reliability of the adjudication. Promoting compliance with the NLRA, while not a permissible regulatory objective,

is a self-commending proprietary decision to not add to the wealth of law violators with tax dollars.

II. The NLRA Does Not Preempt The Choices Of Market Participants; It Protects Them

Appellants' thrust is this: the state is here qua consumer. The NLRA does not regulate consumer choices. The NLRA protects consumer choices. The NLRA does not discriminate against the states as consumers.

Appellee's argument reduces to this: states do not have equal rights as private proprietors and consumers under the NLRA, even when making proprietary and consumer choices, because the states are states.

Nowhere does appellee doubt that the NLRA lets General Motors make the same decision Wisconsin has made.

Nowhere does appellee show that, whereas the NLRA gives General Motors this right, it denies it to the states.

Nowhere does appellee show that Congress discriminated against states as consumers.

Thus, appellee is helpless to show that the NLRA departs from this Court's presumptions (1) that "States themselves [may] operate freely in the free market" and (2) that simply as a matter of "[e]venhandedness ... when acting as proprietors, States should similarly share existing freedoms from federal constraints ...." Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980).

Appellee simply ignores the states' status qua consumer and qua proprietor. For example, its argument regarding appeal rights turns away from state proprietary buying decisions to focus on

state police power regulations (Br. at 20-21.) This argument can fare no better than its first amendment argument. The legislative decision not to subsidize the exercise of even fundamental constitutional rights does not infringe the right. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549-50 (1983). Moreover, Wisconsin does not act because an appeal was filed. Unlike Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), the state there denied unemployment compensation benefits for filing an unfair labor practice charge. But (a) Wisconsin does not respond to the filing but to the adjudicated results and (b) its refusal to do business is a proprietary choice and not a regulatory welfare program.

Amici Chamber of Commerce and NLRB also ignore the state qua consumer. They raise the spectre of interference with the flow of commerce, the effectiveness of NLRB remedial machinery, and the amicable resolution of collective bargaining disputes. They suppose the fifty states and numerous municipalities, who have enormous buying power, might choose not to deal with recidivists. The spectre is speculative, of course. Moreover, at best it makes a case why Congress might choose to prevent these consumer boycotts. It is unresponsive to whether Congress has done so.

> Even if it should be proved that states have a direct financial stake in a broad range of private concerns, we feel that a determination that states must be treated differently from private companies because of the pervasiveness of their financial interests is itself

> the type of policy decision which should be made by Congress ....

Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1029 (3rd Cir. 1977) (en banc) (an NLRA, state-spending decision case).

Appellee says this Court already has pretermitted these boycotts. It relies on the holding in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), that preemption applies to state rules "regardless of the mode adopted." All such expressions by this Court, however, have been in the regulatory context. By ignoring the states qua consumers, appellee would expand the preemption doctrine, not apply it.

The Board directly confronts this Court's holding that, if the state acts as a market participant, "no conflict

between state regulation and federal regulatory authority can arise." United Building and Construction Trades Council v. Mayor of Camden, 104 S. Ct. 1020, 1028 (1984) (emphasis the Court's). So the Board says it is "fatuous" for Wisconsin to say it imposes no "penalty" but only tells the vendor to take its business elsewhere. (Board Br. at 14.) But that follows from the Camden holding, which is not fatuous. In contending otherwise, the federal government only impeaches its own arguments, repeatedly and successfully made, that a sovereign may use its spending power to do indirectly what it cannot do directly. Those cases can mean only one thing: proprietary choices are not regulations.

The real question, then, is whether Congress has regulated these consumer and proprietary choices.

Congress has not regulated consumer or proprietary, trading partner choices under the NLRA. Wisconsin is as free as General Motors to make this choice. In resisting this conclusion the amici and appellee make essentially three points: (1) Wisconsin, unlike General Motors, is subject to the Supremacy Clause; (2) the NLRA forbids statutory employers from violating the NLRA rights of employes by means of a proprietary choice (AFL-CIO Br. at 11); and (3) Wisconsin's economic boycott is inimical to the secondary boycott policies of the NLRA. (Board Br. at 23 n. 16.)

The first point is unresponsive. Of course, Wisconsin is subject to the Supremacy Clause and General Motors is not. But the Supremacy Clause does not come into play unless the NLRA has come

into play, viz., by regulating the choice of picking a trading partner.

The second point turns on itself. To be sure, a statutory employer may not use a proprietary right as a ruse to discriminate against employes in violation of the NLRA (AFL-CIO Br. at 11.) But the states are expressly excepted from the statutory definition of "employer." 29 U.S.C. sec. 152(2). Moreover, the Act does not reach the proprietary choice as such: it reaches that choice if used to violate employes' NLRA rights, and only if the proprietor has control over the employment relationship. See Austin Co., 101 NLRB No. 197, 31 LRRM 1215 (1952). Indeed, even the same amicus concedes that nothing in the NLRA "remotely touches" the right of one employer to refrain from

doing business with another. (AFL-CIO br. at 20.)

The third point is in error. The NLRA protects these consumer choices. First, the secondary boycott policies of the NLRA relate only to union coercion, not employer or consumer choice. See 29 U.S.C. sec. 158(b)(4). Second, the reason unions may not engage in secondary boycotts is to preserve the "freedom of choice ... whether to refuse to deal with another or to maintain normal business relations ...." Local 1976, U.B.C. & J. v. NLRB, 357 U.S. 93, 105 (1958).

There is no doubt that the NLRA treats Wisconsin as a consumer who can refuse to buy Gould's goods. Assume a union of Gould's employes distributed handbills in front of a state-owned hospital explaining that it had a dispute with Gould, advising that Wisconsin used

Gould's products, encouraging consumers not to use the goods the hospital had purchased from Gould, and appealing to state officials to terminate dealings with Gould. This union appeal would be lawful. See NLRB v. Servette, 377 U.S. 46, 51 (1964). It follows Wisconsin could agree with the union not to use Gould's goods in its hospital. Appellee's argument, however, would mean the states (not other proprietors or consumers) are preempted from so agreeing with the union. This contradiction in its argument is aggravated, not diminished, by saying Wisconsin acts as a consumer in making this agreement with the union but is not a consumer when it boycotts Gould as a matter of its own policy.

The amicus Board similarly contradicts itself. It suggests that an

agreement between Wisconsin and a Gould union not to deal with Gould violates the hot-cargo ban in the NLRA. Sec. 8(e), 29 U.S.C. 158(e) (Its br. at 23, n. 16). But the Board has ruled that a union and a state agency may enter into hot-cargo agreements because the states are not statutory employers. IBEW, Local 3 (N.Y. Electrical Contractors Ass'n), 244 NLRB, No. 46, 102 LRRM 1285 (1979).

Unquestionably Wisconsin as a consumer could voluntarily agree with Gould's union not to deal with Gould. As a consumer, Wisconsin can unilaterally make the same decision.

The right of liberty of contract, while not absolute, has been called "inalienable." Frisbie v. United States, 157 U.S. 160, 165 (1895). This right includes the "independent discretion" to choose a trading partner. United States

v. Colgate & Co., 250 U.S. 300, 307 (1919).

States have this right: "Even where 'integral operations' are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." Reeves, Inc. v. Stake, 447 U.S. 429, 438 n. 10 (1980).

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deems state involvement to be.

Garcia v. San Antonio Metro. Transit Authority, 105 S. Ct. 1005, 1015 (1985).

Despite the states' sovereign prerogatives and the well-ensconced right of liberty of contract which they enjoy, appellee effectively says Congress has

dictated with whom the states may or may not choose to do business. But it is precisely this kind of fundamental state right that will not be deemed overridden absent a congressional declaration that is unequivocal, compelling, or unmistakable.

Nothing in the failure of passage of the federal debarment proposal constitutes an unequivocal or unmistakable congressional divestment of state trading partner choices. As a general matter, unsuccessful legislative attempts are unreliable guides to legislative intent. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 n. 11 (1969). This is especially so here where appellee looks to a 1978 proposal as bearing on the meaning of the NLRA enacted some thirty years earlier. Additionally, the debarment proposal was

but one pea in a much larger pod of proposals to make major changes in the NLRA. It passed the House but was defeated by a filibuster in the Senate. See Willmore, NLRB Rulemaking, 89 Yale L.J. 982, 987 (1982); Rosen, Labor Law Reform: Dead or Alive? 57 University of Detroit Journal of Urban Law 1 (1979). Its failure of passage is meaningless as to the doctrine of NLRA preemption, as an intent to change the right of states to choose their trading partners, or as an intent to discriminate against the states. In no event is it a "regulation" of others' proprietary or consumer choices.

There being no federal regulation of state proprietary or consumer choices, a source for preemption becomes elusive. Garmon applies only if a sec. 7 or sec. 8 NLRA regulation is involved. There is

none. All parties and amici appear to agree that the second branch of the NLRA preemption doctrine of Machinists v. Wisconsin Empl. Rel. Com'n., 427 U.S. 132 (1976), is inapposite.

Appellee would have this Court expand preemption to insulate it from economic boycotts for its recidivism, but only from state boycotts. But an economic boycott is not a regulatory "penalty." It tells the law violator to take his business elsewhere. It is expressive economic activity which is generally protected. See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Since the NLRA does not regulate state consumer or proprietary choices, even if based on NLRA conduct, it hardly can be said to "preempt" the state qua consumer or qua proprietor.

III. NLRA Preemption Would Not Apply In Any Event

The appellee and amici take issue with appellants' assertions that the controversies presented to the two forums are not identical and that Gould's business opportunities with Wisconsin are only of peripheral concern to the NLRA. They say Wisconsin invades the remedial scheme that is within the exclusive domain of the NLRB, that Wisconsin has no nonlabor interest to serve, that its residents never were affected by the particular unfair labor practices, and that Wisconsin acts only to punish NLRA violators.

But the controversies are not identical. The Board may not order

Wisconsin and Gould not to do business with each other. Wisconsin does not determine the merits of the labor dispute. Wisconsin does not remedy any injury to the bargaining relationship.

Appellee mistakes the nature of the decision -- a refusal to do business -- with the conditions for its exercise -- adjudicated unfair labor practices. This Nation, as well as the several states, is engaged in a policy debate as to whether to economically boycott a far away land that endorses racial apartheid. The nature of that decision is moral, social, and proprietary. It remains so even if Americans themselves have not been victimized by the racism, even if economic inefficiencies result, and even if the decision responds to an

underlying condition, racism, that cannot be regulated.

The question for the NLRA is how to cure the unfair labor practices. The question for Wisconsin is whether to reward the violators by awarding them contracts.

These interests are generically distinct. If the sovereign power to make this policy choice is to be evicted, it is for the Congress to say so unequivocally, not for this Court to do so.

The issue in this case is peculiarly for the Congress to resolve. Affirmance of the Seventh Circuit would have two severe consequences: (1) it would

abridge the generally recognized principle of liberty of contract of consumers and traders to choose a business partner, and (2) it would infringe on state sovereign choices: the court below did order Wisconsin to do business with Gould.

Each result should give pause. The NLRA preemption doctrine is an especially unwarranted basis for this invasion. Justice Frankfurter referred to the doctrine as "Delphic." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). Oracular vision is inappropriate here. Congress can speak up if it wants to limit these valued rights.

CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of

the court of appeals insofar as it affirms the judgment of the district court that the state statutes in question are unconstitutional.

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NO. 84-1484

Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1984

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,
Appellants,

v.

GOULD, INC., a Delaware Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF APPELLANTS

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three violations of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, (NLRA) as determined by the federal courts. The Connecticut statute is very similar to the Wisconsin statutes under review here. Those statutes, Wis. Stats. §§ 16.75(8) and 101.245, also provide for a state contract prohibition on the basis of three NLRA violations within a five year period. Thus, the State of Connecticut has a substantial interest in the proper resolution of the question presented in this appeal.

The State of Connecticut files this brief in support of the appellants urging that the judgment of the U.S. Court of Appeals for the Seventh Circuit be reversed.

SUMMARY OF ARGUMENT

A state law involving an exercise of the state's contracting power is not preempted by the NLRA in the absence of an indication of Congressional intent to preempt. That conclusion is based on this Court's recent holding that state legislation under the state's police powers is not preempted by the NLRA in the absence of an indication of Congressional intent to preempt. The Wisconsin statutes involving an exercise of the state's contracting power are not preempted by the NLRA since there is no indication of Congressional intent to preempt them.

ARGUMENT

I.

THE WISCONSIN STATUTES PROHIBITING STATE PURCHASES OF PRODUCTS MANUFACTURED OR SOLD BY EMPLOYERS WHO HAVE REPEATEDLY VIOLATED THE NATIONAL LABOR RELATIONS ACT (NLRA), 29 U.S.C. § 151 ET SEQ., ARE NOT PREEMPTED BY THE NLRA

A. *The Wisconsin Statutes Are Not Preempted By The NLRA Since An Expression Of Congressional Intent To Preempt The State's Contracting Power Is Absent*

1. The State Acting As Market Participant Is Not Subject To NLRA Preemption In The Absence Of An Expression Of Congressional Intent

This Court has held that a state acting as a market participant purchasing goods and services rather than as a market regulator is not subject to the Commerce Clause of the U.S. Constitution. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). This Court has further stated: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810. That language was expressly approved in *Reeves, Inc. v. Stake, supra*, 447 U.S. at 436, and *White v. Massachusetts Council of Construction Employers, Inc., supra*, 460 U.S. at 207. Accordingly, in the absence of Congressional action prohibiting a state from exercising its

contracting powers, the Commerce Clause does not restrain the states.

A clear expression of Congressional intent to restrict the states in the exercise of their contracting powers is required. This Court's language in *Alexandria Scrap* quoted above suggests the need for Congressional action specifically related to the state's function as market participant. Moreover, this Court was sensitive in *Alexandria Scrap* to the issue of whether Congress could constitutionally prohibit the particular kind of state market participation involved in that case. *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810 n. 19. This suggests a further concern for state sovereignty in Congressional action restricting the state's contracting power. Regardless of what constitutional limitations on Congressional action may, in fact, exist, this Court's sensitivity supports the need for a clear expression of Congressional intent to encroach on the state's contracting power.

The reasoning underlying this Court's recognition of Commerce Clause exemption for the state as market participant also indicates requirements for Congressional action. A basic premise for the exemption involves considerations of state sovereignty. *Reeves, Inc. v. Stake, supra*, 447 U.S. at 438. Moreover, the states enjoy a right similar to the unrestricted contracting power of private businesses. *Id.* at 438-439 & n. 12. The burden on state market participant activities of restrictions for private businesses suggests that, "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439. The reference to freedom from federal constraints in general accentuates the rights of the state as market participant. The above rationale in *Reeves* thus provides further basis for requiring Congressional intent to impinge on the state's contracting power to be clearly expressed.

In *Hayfield Northern Railroad Company, Inc. v. Chicago And North Western Transportation Company*, _____, U.S. _____, 104 S.Ct. 2610 (1984), this Court indicated the proper approach to Congressional action restricting state contracting powers. This Court recognized the principle that preemption is not established unless "the nature of the regulated subject matter permits no other conclusion, or . . . the Congress has unmistakably so ordained." *Id.* at _____, 104 S.Ct. at 2617. In *Hayfield*, this Court held that the state's exercise of its traditional power of eminent domain over railroad property that has been abandoned required a determination that Congress had "unmistakably ordained" preemption. Moreover, the state's traditional power of eminent domain justified a refusal to hold that the regulation of abandoned railroad property "permits no other conclusion" than preemption. Accordingly, only a clear expression of Congressional intent to preempt the state's traditional eminent domain power would suffice for preemption.

The holding that preemption of the state's traditional eminent domain power requires a clear expression of Congressional intent strongly suggests a similar rule for the state's exercise of its contracting powers. Both types of powers are concerned with the state's obtaining the material resources necessary to operate state government. Moreover, the state's contracting power is similarly a traditional state function. *Reeves, Inc. v. Stake, supra*, 447 U.S. at 438-439 & n. 12. Also, the state's right, similar to a private business, to exercise freely its contracting power establishes the extent of state sovereignty in that area similar to the historic exercise of the power of eminent domain. Accordingly, a state acting as a market participant is not subject to preemption in the absence of a clear expression of Congressional intent.

This Court has recently held that an expression of Congressional intent is required for NLRA preemption of certain state regulation. In *Metropolitan Life Insurance*

Company v. Massachusetts, _____ U.S. _____, 53 U.S.L.W. 4616, 4625 (June 3, 1985), this Court held that a state's exercise of its police powers to promote public health and safety is not preempted by the NLRA in the absence of a specific indication of Congressional intent. It was recognized that Congress developed the NLRA "within the larger body of state law promoting public health and safety." *Id.* at 4625. That recognition was based on the traditionally wide latitude of the states under their police powers to legislate on matters of health and safety.

The approach with respect to NLRA preemption of state police power laws is equally applicable to the state's exercise of its traditional contracting powers, which themselves work in tandem with and support the exercise of police powers. Accordingly, the state's exercise of its contracting power should also not be preempted by the NLRA in the absence of an indication of Congressional intent to preempt.

2. Congress Has Not Expressed An Intent In The NLRA To Preempt Wisconsin's Statutory Prohibition Of State Contracts For Employers Who Have Repeatedly Violated The NLRA

The Wisconsin statutes impose a prohibition on state contracts for employers who have repeatedly violated the NLRA. Certainly the statutes constitute an exercise of the state's contracting power. The kind of exercise of that power involved here falls within the most traditional form of state market participant activities in determining the parties with whom it will deal. See *Reeves, Inc. v. Stake*, *supra*, 447 U.S. at 438-439 & n. 12. Accordingly, the Wisconsin statutes are not preempted by the NLRA in the absence of an indication of Congressional intent to preempt them.

The understanding that the Wisconsin statutes must be treated as an exercise of the state's contracting power is

confirmed by recent cases. In *White v. Massachusetts Council of Construction Employers, Inc., supra*, this Court held that a city executive order requiring construction projects funded with city funds to be performed by a work force of at least half Boston residents did not violate the Commerce Clause. The decision was based on the principle of *Alexandria Scrap* and *Reeves* that a state acting as market participant is not subject to the Commerce Clause. *Id.* at 215. This Court held that the executive order did not constitute market regulation as opposed to market participation despite its condition on employment of contractors. *Id.* at 211 n. 7. Its conclusion was based on the lack of distinct regulation of private parties in light of the city's major participation in construction projects. Construction employees could thus be regarded as "working for the city" in a substantial sense.

The key element of this Court's conclusion is its recognition that, while the executive order placed restrictions on private parties, it could, as a practical matter, be considered market participant activity because of the city's major role. This approach indicates that this Court treats restrictions imposed by a governmental entity on its own purchasing activities as a market participant function rather than a regulatory function regardless of the appearance of a regulatory purpose. Moreover, this Court concluded, specifically in response to the suggestion of market regulation, that "the executive order in this case *falls well within* the scope of *Alexandria Scrap* and *Reeves.*" *Id.* at 215 n. 7. (Emphasis supplied.)

The Wisconsin statutes provide for a simple prohibition on state contracts. Their remedy contains no aspect of market regulation in any sense. They involve a classic exercise of the state's power to determine trading partners. They must be considered an exercise of the state's contracting powers under the approach in *White* regardless of whether a purpose of the statutes was the regulation of labor relations.

In *Amalgamated Transit Union, Div. 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977), the court plainly regarded as market participant activity New Jersey's action in threatening to withdraw subsidies to private transportation companies for agreement with unions to cost of living clauses. The court relied heavily on the analogy to a private consumer who attempts to exert pressure on parties to collective bargaining negotiations in order to hold down the costs of services. The court held that New Jersey's exercise of its contracting power was not preempted by the NLRA since Congressional intent to preempt was not implied. *Id.* at 1029. This indicates a recognition that a state's contracting power could not be preempted by the NLRA in the absence of a specific indication of Congressional intent to preempt.

The Wisconsin statutes constitute an exercise of the state's contracting powers under *Byrne* since they involve the state's action, similar to a private consumer, in determining trading parties. They should also not be preempted by the NLRA in the absence of an indication of Congressional intent to preempt.

The NLRA contains no expression of intent to preempt state laws relating to the state's exercise of its contracting powers. Accordingly, the Wisconsin statutes are not preempted by the NLRA since there is no indication of Congressional intent to preempt them.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

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Office-Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,
Appellants,

v.

GOULD, INC., a Delaware corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the National Labor Relations Act preempts Wisconsin statutory provisions that prohibit the State from purchasing products of certain recidivist violators of the National Labor Relations Act.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1484

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,
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On Appeal from the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE*

Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellants.*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The court of appeals held that the National Labor Relations Act ("NLRA") preempts state law prohibiting the state of Wisconsin from purchasing products of certain recidivist violators of the NLRA. The effect of this decision is to undermine the traditional functions and activities of state and local governments within our federal system in at least two respects. First, state and local governments historically have not only regulated markets but also have participated in markets. In so participating, state and local governments have traditionally imposed reasonable requirements on contractors that do business with them. The content of such requirements, so long as it does not conflict with the Constitution or with applicable federal law, has been left to the government entity to decide in light of its own democratic experience and market exigencies at the time. The court of appeals, however, has substituted its view of an acceptable requirement for that of the state of Wisconsin.

Second, it is an essential ingredient to the operational success of our federal system that state and local governments develop and implement policy positions consistent with federal policy choices, statutes, and programs. The Wisconsin statutory provisions at issue in this case are fully consistent with and dependent upon the execution of federal policy by federal organs. Rather than endorse this cooperative model of federal-state relations, the court

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* Appellants have consented to the filing of this brief. Appellee has not.

of appeals dismantled it on the insubstantial ground that Wisconsin, in effect, too faithfully endorses federal policy by subjecting recidivist NLRA violators to restrictions in their market dealings with the state.

In our democratic system, accommodation of federal and state policies ought not to be subjected to wooden judicial analyses that aim unnecessarily to undermine reasonable market choices of state and local governments. The *amici* are concerned that the decision of the court of appeals, if affirmed by this Court, will encroach upon the legitimate role of state and local governments as market participants and will signal an unjustified hostility to other state and local policy decisions that are fully consistent with federal policy. Thus the *amici* submit this brief to assist the Court in resolution of the preemption issue raised in this case.

Respectfully submitted,

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No. 84-1484

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; and GARY C. SHEALY,

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v.

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICI CURIAE*

The interest of the *amici* is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE

In 1979, the State of Wisconsin enacted legislation, effective May 21, 1980, requiring the State's Department of Industry, Labor and Human Relations to maintain a

list of persons or firms that have been found by the National Labor Relations Board ("NLRB") and by federal courts to have committed three separate violations of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-167 (1982), or to be in contempt for failing to correct three different NLRA violations within a five-year period. Wis. Stat. Ann. § 101.245(1) (West Supp. 1984). The name of such a person or firm shall remain on the list for three years. Wis. Stat. Ann. § 101.245(4) (West Supp. 1984). The significance of the list is that Wisconsin's Department of Administration is prohibited from purchasing any product known to be manufactured or sold by any person or firm included on the list. Wis. Stat. Ann. § 16.75(8) (West Supp. 1984). As cogently stated by appellants ("Wisconsin") in their jurisdictional statement, "Wisconsin chooses not to do business with recidivist labor law violators." (Juris. Statement at 10.)[1]

Appellee Gould, Inc. ("Gould"), a Delaware corporation with its principal place of business in Illinois, was added to the list in August 1982. Gould has not disputed that it met the statutory requirements for inclusion on the list. At that time, Gould had existing contracts with Wisconsin to provide goods and services in excess of ten thousand dollars, and apparently harbored expectations that it could bid for and would be awarded additional such contracts in the future. Wisconsin advised Gould, in

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[1] The Wisconsin statutory provisions are reproduced in the Appendix hereto. Other states have passed similar legislation barring the awarding of state contracts to employers found by a federal court of appeals to have violated the NLRA. *See* Conn. Gen. Stat. § 31-57a (1985) (three time violators); Md. Ann. Code art. 21, § 3-404 (1981) (one time violators); Mich. Comp. Laws Ann. § 423.322-324 (West Supp. 1985) (three time violators); Ohio Rev. Code Ann. § 121.23 (Page 1984) (two time violators); *cf.* Me. Rev. Stat. Ann. tit. 26, § 1402 (Supp. 1984) (willful or repeated OSHA violators).

light of its inclusion on the list, that the existing contracts would be cancelled if that could be done without penalty and that it would be debarred from doing business with the state until July 1, 1985.

In a district court suit commenced in February 1983, Gould challenged the state's actions on a number of grounds, including violations of the preemption doctrine and of the due process and equal protection clauses of the fourteenth amendment. After granting a preliminary injunction, the United States District Court for the Western District of Wisconsin held that the Wisconsin statutory provisions were preempted by the NLRA. The court permanently enjoined Wisconsin from debarring Gould from doing business with the state, from refusing to purchase its goods, and from including Gould on the list of recidivist labor law violators. 576 F.Supp. 1290, 1299 (W.D. Wis. 1983). In addition, the district court held that Gould's fourteenth amendment claims alleging violations of due process and equal protection, while not otherwise meritorious, were sufficient to ground federal jurisdiction and an award of attorney's fees even though Gould had prevailed only on its preemption claim.

The court of appeals affirmed the district court's preemption holding but reversed the award of attorney's fees. 750 F.2d 608 (7th Cir. 1984). The preemption question alone is before this Court. In finding preemption, the court of appeals was persuaded that the thrust of the Wisconsin statute was punitive while the NLRA itself was clearly remedial in nature. State interference with the federal scheme, therefore, could be inferred. *Id.* at 611. The court of appeals saw no merit in Wisconsin's contention that its actions were permissible because it was acting only as a market participant, not as a market regulator. In addition, the court of appeals distinguished this Court's cases upholding actions by a state resulting from market participation, *e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), as involving "dormant" commerce clause sit-

uations. 750 F.2d at 613. Here, by contrast, "Congress has legislated decisively in the area." *Id.*

SUMMARY OF ARGUMENT

I. Wisconsin was not properly subjected to preemption analysis because it was acting as a market participant when it enacted these contracting requirements. The commerce clause is directed against certain state regulation of interstate commerce. Commerce clause preemption analysis, therefore, applies only when a state is acting as a market regulator. It does not apply when a state acts as a participant in the market. *E.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

This market participant/market regulator distinction is not limited to "dormant" commerce clause cases. The language of the market participant cases indicates no such limitation. In fact, applying the market participant doctrine in this case is entirely consistent with the purposes of both the commerce clause itself and the NLRA, which was enacted under Congress' commerce clause authority. Each was intended to restrict the states' ability to *regulate* in certain areas of national concern. When states *participate* in a market, Congress may still regulate their conduct, but only to the extent to which it regulates private market participants. Congress has not regulated the states' contracting power at issue in this case. It has not told market participants that they must deal with recidivist NLRA violators.

Wisconsin clearly acted as a market participant when it enacted these statutes. It merely decided how and where it would allocate scarce state funds. In allocating these funds, Wisconsin took policy considerations into account along with purely economic considerations. One of these policy considerations is a judgment by the elected representatives of the people of Wisconsin that the state should not aid labor law violators. Identifying labor law violators, however, is left entirely up to the federal regu-

latory system. There is absolutely no interference with the federal regulatory scheme.

II. Even if the state was acting as a market regulator, this regulation is not preempted by the NLRA. A reexamination of the holding in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), in light of its facts, the purpose of the NLRA, and subsequent cases makes this result clear.

A. *Garmon* itself preserves a place for state regulation. *Garmon* involved picketing, an activity that is at the heart of the federal scheme of labor regulation. The NLRA was intended to regulate such "vital, economic instruments" of labor-management relations, 359 U.S. at 241, and to do so in a manner that produces a uniform national regulatory scheme. Only regulations that confound national labor policy or interfere with the NLRB's uniform administration of that policy are preempted. Wisconsin's statutes do neither. They are entirely consistent with national labor policy, and in fact are dependent upon NLRB actions for their operation. They present no threat to national labor policy and involve no duplication of proceedings between the state and the NLRB.

B. Subsequent cases confirm this understanding of *Garmon*. Cases finding preemption involved regulations that were either inconsistent with the policies of the NLRA or that might undermine the uniform regulatory scheme set up by the NLRA. In contrast, in cases involving regulations that did not confound national labor policy or interfere with the regulatory scheme set up to implement that policy, no preemption was found. Such regulations present no threat to the uniform national labor policy established by the NLRA. Wisconsin's statutes closely resemble the regulations upheld in the cases where no preemption was found. They are entirely consistent with the NLRA's policies. Wisconsin's statutes, furthermore, do not regulate labor disputes. They leave the job of regulating the conduct of management and labor to the NLRB.

C. The court of appeals incorrectly applied the *Garmon* doctrine. In this case, the state and federal policies are consistent. The regulatory scheme implemented by the NLRA is also unaffected. No alternative procedures or remedies are provided. The state acts out of a strong local interest—allocating its revenue—and not out of a desire to punish recidivist labor law violators.

ARGUMENT

I. Preemption Analysis Was Not Appropriate in This Case.

Wisconsin has chosen to impose certain requirements on those with whom it does business.[2] For example, state specifications favor goods manufactured in Wisconsin wherever possible, Wis. Stat. Ann. § 16.75(1) (West Supp. 1984), and state contractors must report to the state on any subcontracts awarded to minority businesses. *Id.* § 16.75(3m)(c). Those who would contract with Wisconsin are also expected to achieve a modest level of compliance with the labor laws of the United States, or else they may be debarred from doing business with Wisconsin for three years. Wis. Stat. Ann. §§ 16.75(8), 101.245 (West Supp. 1984).[3] The court of appeals held that the

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[2] Wisconsin is not alone in forbidding its agencies from contracting with certain persons or purchasing certain products. States commonly impose restrictions on state spending where the expenditure would violate state policy. *See, e.g.*, Iowa Code Ann. § 73.3 (West Supp. 1985) (establishing mandatory preference for Iowa labor in all state employment and contracting); N.Y. State Fin. Law § 139-a (McKinney 1974) (disqualifying persons or firms from contracting with the State for five years upon refusal to testify, sign a waiver of immunity against criminal prosecution, or answer any relevant question, in an investigation concerning any transaction or contract with the State); 73 Pa. Cons. Stat. Ann. § 1884 (Purdon Supp. 1985) (requiring contractors entering into public works contracts to use domestically produced steel).

[3] States frequently use articulated federal policies as touchstones for state policies. *See, e.g.*, Mich. Comp. Laws Ann. § 487.358 (West

latter requirement is preempted by the NLRA. There can be no preemption here, however, because Wisconsin was not regulating commerce when it acted. It was merely exercising its prerogative as a buyer of goods to choose with whom and on what terms it will deal.[4] *See Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12 (1980). Wisconsin was a market participant.

This Court has employed market participant analysis to distinguish between acts taken by a state as a *regulator* of interstate commerce and those it takes as a *participant* in interstate commerce. If the state is a market participant, the strictures imposed by the commerce clause do not apply. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).[5] The

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Supp. 1985) (making FDIC coverage a "condition precedent" to approving articles of incorporation of Michigan banks); N.J. Stat. Ann. § 24:2-1 (West Supp. 1985) (authorizing State Department of Health to adopt federal regulations promulgated under the Federal Food, Drug, and Cosmetic Act); 35 Pa. Cons. Stat. Ann. § 780-133 (Purdon 1977) (food and drugs not deemed adulterated if they comply with the applicable federal act).

[4] Of course, this "prerogative" is not absolute. A state would be hard-pressed, for example, to square preferences for contractors of the white race with the fourteenth amendment. On the other hand, in the absence of a direct constitutional imperative ("nor shall any State deprive any person . . . ." U.S. Const. amend. XIV) or direct congressional regulation of a state's market participation, such participation is not restrained by federal authorities. No such constitutional imperative or congressional regulation is present in this case.

[5] In *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S.Ct. 2237 (1984), the Court reiterated its support for the market participant doctrine but found that, under the facts of that case, Alaska was a market regulator rather than a market participant. Unlike typical sellers of goods, the state of Alaska imposed downstream requirements on purchasers of timber—a clearly regulatory action. *Id.* at 2244 (plurality opinion). *See* note 9 *infra*.

court of appeals refused to apply these precedents to the instant case; it maintained that these cases apply only to "dormant Commerce Clause" situations. 750 F.2d at 613. Upon examination of the reasoning behind these precedents in light of the purposes of the commerce clause and the NLRA, it will become clear that these cases do in fact apply to "active" as well as "dormant" commerce clause situations.[6]

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[6] The preemption issue involved in this case is but one species of the general doctrine of preemption. This doctrine derives from the structure of the nation itself. The supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, establishes the basic principle that the laws and Constitution of the United States are superior to those of the states. Where the Constitution has given power over an area exclusively to the federal government, the states cannot act in this area even when the federal government does not act. Also, where both the states and the federal government have authority to act, an action by the federal government preempts conflicting state action. Furthermore, where Congress does act through a plenary grant of power, it can legislatively "occupy the field" and prohibit any state regulation in the particular area, even regulation consistent with the federal law. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking down state alien registration legislation).

Each of these types of preemption is encountered in commerce clause jurisprudence. The grant to Congress of power to regulate interstate commerce has been interpreted to place limits on the powers of the states, even where Congress has not acted. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In these "dormant" commerce clause cases, a state regulation of commerce can be preempted by federal authority, but only if it places an impermissible burden on interstate commerce. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

Where Congress has acted to regulate commerce, the states' sphere of permissible action is much smaller. Of course, any state regulation of commerce that directly conflicts with a federal regulatory statute is preempted. Furthermore, where the application of a state law would frustrate the purposes of the federal act in question, it is also preempted. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766 (1945); *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 104 S. Ct. 2610 (1984). Yet, this "active commerce clause"

This Court first applied the market participant analysis in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In that case, the court upheld against a commerce clause challenge a Maryland program of paying, under some circumstances, a bounty for recycling Maryland-titled cars only to Maryland scrap processors. The Court distinguished *Alexandria Scrap* from other cases in which the commerce clause had been invoked to strike down state regulation of commerce:

> The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.

Id. at 806.

The Court then examined the purposes of the commerce clause, which was "designed in part to prevent trade barriers" that had harmed the unity of the states under the Articles of Confederation. *Id.* at 807. It concluded that

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preemption also leaves some room for state regulation. There is, however, a "narrow ambit of decisions in which [the] Court has indicated that Congressional legislation so occupied the field of a particular subject area that state regulation within that field would be improper no matter how well state law comported with the federal policies involved." *Hayfield N. R.R. Co.*, 104 S.Ct. at 2617 (citations omitted). Because such preemption leaves states with *no* freedom to act and is such a powerful assertion of federal power over the states, the Court is reluctant to infer such preemption. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). It will infer such complete preemption only if the nature of the subject matter permits no other conclusion or Congress has "unmistakably so ordained." *Hayfield N. R.R. Co.*, 104 S.Ct. at 2617 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

"[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. The Court stated in a footnote that its inclusion of the phrase "in the absence of congressional action" implied no view on whether Congress could prohibit the action taken by Maryland. *Id.* at 810 n.19. The Court thus sought to avoid precluding a role for Congress to *regulate* Maryland's market participation if it were so to choose. The Court, however, made no suggestion that, when a state is a market participant, congressional action would trigger a *preemption* result.

In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the Court upheld South Dakota's right to sell state-produced cement only to state residents. In doing so, the Court reaffirmed *Alexandria Scrap*, noting that the market participant/market regulator distinction "makes good sense and sound law." *Id.* at 436. Moreover, the Court's view of the purpose of the commerce clause suggests no active/dormant distinction. "There is *no indication* of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 437 (emphasis added). Once again, the Court cautioned that, in the event of congressional action, the state may be "burdened with the same restrictions imposed on private market participants." *Id.* at 439. Yet there is no intimation that such *regulatory* enactments by Congress effect a *preemption* result.

The Court applied the same analysis in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), to uphold an order by the mayor of Boston directing that all city-financed or city-administered construction projects had to be performed by a workforce of at least fifty percent Boston residents. The Court cited *Alexandria Scrap* and *Reeves* for "the proposition that when a state or local government enters the

market as a participant it is not subject to the restraints of the Commerce Clause." *Id.* at 208. There is no limiting language to indicate that this principle applies only to dormant commerce clause cases.

Any reading of these cases that confines their precedential application to dormant commerce clause situations ignores this Court's express understanding of the purposes of the commerce clause.[7] The Court has stated that the commerce clause protects against burdensome state *regulation* of commerce. It is not directed at state *participation* in the flow of commerce. The NLRA, which was enacted pursuant to authority granted by the commerce clause, can have no greater effect. The NLRA preempts states from *regulating* in the sphere of management/labor relations. It does not, and does not purport to, regulate states when they participate in the flow of commerce as purchasers of goods.

This Court should not be, and has not been, quick to preempt state legislation. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). This is particularly true where the purposes of the state and federal acts in question are consistent, as in this case. *Id.* The market participant analysis is not a retreat from prior commerce clause doctrine. It is merely a recognition that, when states are acting as proprietors, they should be treated as proprietors under the commerce clause.[8] Consistent with the tenets of our federal system, Congress can surely regulate states' proprietary conduct,

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[7] Nor is *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S.Ct. 2237 (1984), to the contrary. There, the Court reaffirmed the market participant analysis but found that Alaska was a market regulator, not a market participant. *See* note 9 *infra*.

[8] As stated in *American Yearbook Co. v. Askew*, 339 F. Supp. 719, 725 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972), "[t]o subject every job specification to an *ad hoc* measurement of its effect on interstate commerce would unduly interfere with state proprietary functions if not bring them to a standstill."

but only to the same extent to which it regulates conduct of other proprietors. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980). Congress simply has not chosen to regulate the states in respect to the contracting power at issue in this litigation.

Nor can it be gainsaid that Wisconsin was acting as a market participant, and not as a market regulator, in enacting the challenged laws. By imposing contractual conditions relating to the *bona fides* of state contractors, Wisconsin decided how and where it would spend its purchasing dollars. It did not tell employers what they must do in conducting their labor relations; that is the province of the federal labor laws as enforced by the NLRB and the courts. Wisconsin simply waited for the outcome of federal administrative and judicial proceedings under the NLRA and then, in light of its own democratic experience and understanding of market forces, exercised its inherent authority to determine its expenditures for itself. The state does not require employers to take any action. Contrary to the court of appeals' position, it imposes no penalty on recidivist labor law violators. Rather, recidivist labor law violators may simply take their business elsewhere. In short, the state is simply expressing the collective judgment of its people, through their elected representatives, that Wisconsin should do business only with individuals and firms that have shown respect for and compliance with the national labor policy.[9]

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[9] The contrast between Wisconsin's laws and those of Alaska at issue in *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S.Ct. 2237 (1984), is striking. Wisconsin merely conditions its purchase of goods on the existence of a number of factors. *See* Wis. Stat. § 16.75 (1981). Purchasers typically impose contractual conditions relating to the *bona fides* of the seller. By contrast, as stated by this Court in *South-Central Timber*,

> it is clear that [Alaska] is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the

II. The NLRA Preempts State Law Only When the State Law Confounds the National Labor Policy or Interferes with the Regulatory Mechanism Established by the NLRA to Administer That Policy.

For nearly half a century, this Court has been asked to visit and revisit labor law preemption. In case after case since 1960, moreover, the Court has been requested by parties and *amici* alike to commence its analysis with an obligatory nod toward *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). This brief will not depart from the custom, except to the extent that it will emphasize that the Court should reexamine the holding of *Garmon* in light of the *actual* facts and reasoning in that case, the Court's subsequent decisions in the area, and the compelling need for the Court—in light of the original understanding of *Garmon* as well as later cases—to enunciate a clear principle that will serve as the touchstone for subsequent labor preemption analysis. It is submitted that such a reexamination indeed yields a clear principle, evident both in *Garmon* and in key subsequent cases, that mandates a reversal of the court of appeals' decision. Thus, even if this Court were to determine that the challenged Wisconsin statutes constituted market regulation rather than participation, it would have to side with Wisconsin in this appeal.

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obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.

104 S.Ct. at 2245 (citation omitted). Although a seller normally has no right to sell to any particular buyer, whether it be to Wisconsin or a private concern, a buyer normally has a right to alienate itself of its newly acquired property as it alone sees fit. Alaska's transgression of the latter commercial practice made evident its regulatory mission. Wisconsin's challenged laws violate no similar commercial maxim, and in all respects constitute conventional action by a market participant.

A. *San Diego Building Trades Council v. Garmon* Clearly Preserves a Place for State Regulation.

In *Garmon*, which held that the NLRA preempted a challenged state action, this Court did not have before it a case in which a state had sought to regulate labor-management relations on the periphery of the federal scheme of regulation. Rather, *Garmon* involved an award of tort damages against unions for picketing an employer who had refused to hire only union members or those applying for union membership within thirty days. The case thus struck at the heart of the federal scheme for regulation of labor relations. As Justice Frankfurter stated for the Court, "[t]he case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act . . . [which] govern both protected 'concerted activities' and unfair labor practices." 359 U.S. at 241. These provisions, which "regulate the vital, economic instruments of the strike and the picket line," displace "variegated laws of the several States" and put in their place "a single, uniform, national rule." *Id.*[10]

In his opinion for the Court, Justice Frankfurter acknowledged the inherent ambiguities in labor law preemption analysis, but nevertheless underscored that "the unifying consideration of our decisions [is] the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency [*i.e.*, the NLRB], armed with its own procedures, and

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[10] *See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1338 (1972) ("The crucial area in labor preemption is the law applicable to strikes and picketing."); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. 277, 277-78 (1980) (federal labor law preemption focuses on activities arguably protected by NLRA § 7 or arguably prohibited by NLRA § 8 and on preserving the balance of power between labor and management established by the NLRA).

equipped with its specialized knowledge and cumulative experience." *Id.* at 242. To the *Garmon* Court, the NLRB's administration must be viewed broadly, so that, "[w]hen the exercise of state power over a particular area of activity threaten[s] interference with the clearly indicated policy of industrial relations, it [is] judicially necessary to preclude the States from acting." *Id.* at 243. By contrast, if the challenged state activity is a "merely peripheral concern" of the federal statutory scheme, (*id.*), or if it "touche[s] interests . . . deeply rooted in local feeling and responsibility," then, "in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244.

The import of Justice Frankfurter's reasoning is clear. The Court was concerned with state regulation that "threatened interference with the clearly indicated policy of industrial relations." *Id.* at 243. There is no doubt that the unions' behavior in *Garmon* constituted a colorable unfair labor practice, (*id.* at 245), subject, under the NLRA, to the "procedures, . . . specialized knowledge and cumulative experience" of the NLRB. *Id.* at 242. Under these circumstances, an *alternative* state damages remedy was simply at loggerheads with the core precept identified earlier in *Garmon*—entrusting administration of the nation's labor policy to the NLRB. *Id.* In short, only if the challenged state action confounds national labor policy or interferes with the NLRB's administration of that policy will it be preempted. The case makes equally clear, however, that state action will not otherwise be preempted, particularly if it reflects strong local feeling and responsibilities.

De Veau v. Braisted, 363 U.S. 144 (1960), decided one year after *Garmon*, supports this view. There, the Court sustained a provision of New York's Waterfront Commission Act that prohibited the collection of dues by a labor organization if any officer of the organization had

been convicted of a felony. The appellant urged that this provision was preempted by section 7 of the NLRA, 29 U.S.C. § 157, which unequivocally grants employees the right "to bargain through representatives of their own choosing," since it plainly interfered with employees' freedom of choice in the selection of their representatives. Rejecting this argument, the Court observed:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers.

Id. at 152. The Court concluded that Congress would not find in the state enactment "a true, real frustration" of its own labor policy. Because the Wisconsin law involved in this case compels a similar finding, and, moreover, vindicates a legitimate and compelling state interest, the preemption challenge must fail. *Id.* at 153.

Wisconsin has chosen not to do business with a certain class of recidivist NLRA violators. This policy choice is in line with the prevailing policies of the NLRA as articulated and applied by the NLRB, and there is no attempt to establish an alternative (even if consistent) remedy to those available through the NLRB. Indeed, Wisconsin's statutes are not only consistent with but also *dependent upon* NLRB actions. The challenged Wisconsin

statutes lead to *no* duplication of proceedings between the state and the NLRB; to *no* different findings of fact on the state and federal levels; to *no* tensions in timing or content between state and federal remedies; and to *no* departures from the national labor policy. *Garmon*, it should be recalled, "does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations." *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). A more harmonious coexistence than that evident in this case is difficult to imagine.

B. Subsequent Cases Confirm the Original Understanding of *Garmon*.

In other cases decided after *Garmon*, this Court has consistently focused on the considerations identified by Justice Frankfurter. In essence, the Court has been concerned with state activity that would confound the national labor policy or interfere with the regulatory mechanism established by the NLRA and thus undermine the uniform national application of the federal laws. The Court has repeatedly preempted concurrent state jurisdiction that would contravene this principle. In *Garmon* itself, for example, the state court awarded damages against a union for picketing activities associated with collective bargaining goals. Clearly, such concurrent jurisdiction could not be tolerated. As stated by this Court in *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983), the inquiry must focus on balancing "harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules" against the state interest involved.[11]

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[11] *See* Shultz & Husband, *Federal Preemption Under the NLRA: A Rule in Search of a Reason*, 62 Den. U.L. Rev. 531 (1985) (arguing for a rule that expressly balances state and federal interests when determining whether preemption is appropriate).

In *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), a union member who was suspended from the union for nonpayment of dues and consequently dismissed from employment under the collective bargaining agreement sued for damages and reinstatement. The state court based its holding of nonpreemption on the fact that Lockridge asserted a cause of action grounded in general contract law. Thus the court needed only to construe a contract and not the NLRA. This Court nevertheless held that the NLRA preempted this action. To allow such a claim would defeat the purpose of the NLRA and would raise the specter of conflicting state law interpretations rather than a uniform national determination on a matter basic to labor relations. *Id.* at 286-87.[12] In *Local 100, United Association of Journeymen v. Borden*, 373 U.S. 690 (1963), a union member's contract and tort claims against the union were held preempted because they encompassed "conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." *Id.* at 698. As a further example, in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), this Court held that a state commission's ruling on a union's refusal to work overtime during contract negotiations had been left deliberately by Congress to the control of market forces; the commission's ruling upset the collective bargaining scheme created by Congress. *Id.* at 149; *see id.* at 156 (Powell, J. and Burger, C.J., concurring) ("state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength" are not preempted).

Where the state or local interest involved does not confound national labor policy or interfere with the regula-

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[12] *See also Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 (1985).

tory scheme designed to enforce that policy, however, no preemption of concurrent state jurisdiction has been found. The Court, for example, has upheld states' laws implementing their interests in protecting their citizens from libel even when the alleged defamatory statements arose from a labor dispute, *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); from outrageous conduct inflicting emotional harm even when related to a labor controversy, *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977); and from the hardships of unemployment resulting from a strike called by the union, *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979). Wisconsin has a similar local interest in protecting its citizens from enriching, through their tax dollars, constant violators of the federal labor laws.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court found no preemption of a store owner's state trespass action against a union picket; the inquiry focused on whether "two *potentially conflicting* statutes were 'brought to bear on precisely the same conduct.'" *Id.* at 194 (emphasis added) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479 (1955)). Similarly, in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Court refused to find preemption of replacement workers' post-strike claims against an employer because there would be no substantial impact on settlement of strikes, (*id.* at 505-06), or interference with the "Board's determination of matters within its jurisdiction." *Id.* at 511.

As recently as last Term, this Court was confronted with the argument that a state's imposition of a contractual term *on the collective bargaining agreement itself* was preempted by the NLRA, especially since the term constituted a mandatory subject of bargaining.

Metropolitan Life Insurance Co. v. Massachusetts, 105 S.Ct. 2380 (1985). The Court ruled that

> No incompatibility exists . . . between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

Id. at 2397. In the present case, the state legislation is indisputably compatible with the NLRA. Further, the contract at issue, unlike the collective bargaining agreement in *Metropolitan Life*, is at the periphery of the federal labor policy.

In articulating the boundaries of the appropriate "coexistence" between state and federal government in the labor field, this Court has thus focused on the substantive consistency of the state's action with the NLRA's policies and on the intrusive effect of the state's conduct on the regulatory scheme of the NLRA. The importance of these factors arises from the preemption doctrine's goal of "avoid[ing] conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971). To constitute "conflicting regulation," the challenged state law must have more than an indirect effect on labor relations. Rather, it must confound the national labor policy or interfere with the NLRB's administration of that policy.

To be sure, the instant case involves state laws that may have a remote and indirect effect on an employer's conduct that is subject to NLRB regulation, but the laws are not directed at regulating that conduct. Regulation of the labor field is left to the NLRB, where it belongs. Wisconsin's actions, which occur *after* the NLRB has made determinations on the merits of labor disputes,

involve the state only as a consumer and the subject business only as a seller of products.[13]

C. The Court of Appeals Misapplied the *Garmon* Preemption Rule.

In the present case, the state and federal policies are entirely compatible. The state's concurrent jurisdiction does not afford an alternative remedy to that available through the NLRB. There is no procedural duplication from the federal to the state level. Wisconsin does not second-guess the NLRB; on the contrary, Wisconsin's actions lend credence to NLRB decisions that are also found worthy of judicial enforcement. There is no chance that conflicting state laws will emerge to displace a uniform national law on the issue of unfair labor practices. Wisconsin's actions do not interfere with the national labor policy; they do not upset the collective bargaining relationship; and they do not interfere with the NLRB's administration of the national labor policy.

Further, the court of appeals' focus on the "punitive" character of the Wisconsin laws is misplaced. The statutes do not punish; they seek to allocate Wisconsin public revenues in a manner consistent with the national labor policy, leaving recidivist labor law violators to do business elsewhere. To call such public enactments "puni-

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[13] In *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 104 S.Ct. 2610 (1984), the Court rejected a preemption challenge to a state eminent domain statute based on the Staggers Rail Act amendments to the Interstate Commerce Act. The Court described the purpose of the Staggers provision as "to abbreviate the period during which a carrier is obligated to furnish financially-burdensome service it seeks to escape through abandonment." *Id.* at 2618. The Court reasoned:

> State condemnation proceedings do not interfere with that purpose insofar as such proceedings *follow* abandonment. . . . Nothing in [Staggers] indicates a federal interest in affording special protection to a carrier after the point at which the carrier's federal obligation ends.

Id. (emphasis in original). Similarly, nothing in the NLRA indicates a federal interest precluding the affirmative use by states of federal actions in the implementation of state policies.

tive" is to deny the dynamic nature of the national and international economies in which companies like Gould operate.[14]

Because the state's actions and the statutes upon which they are based are consistent with the policies of the NLRA, do not interfere with the NLRB, and are generated out of a strong local interest, the Court should recognize that permitting these statutes to stand will not be contrary to the principles of national uniformity and administrative consistency that underlie *Garmon* preemption.

CONCLUSION

For all these reasons, the judgment of the court of appeals as it relates to the preemption issue should be reversed.

Respectfully submitted,

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[14] In its Motion to Affirm, Gould argues that since Congress allegedly "considered and *rejected* debarment as a means of regulating NLRA conduct" (page 1; emphasis in original), Wisconsin is preempted from adopting a similar measure. However, as this Court stated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969), "unsuccessful attempts at legislation are not the best of guides to legislative intent." Moreover, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (1980) (citation omitted). A more reasonable inference—to the extent that *any* inference from Congress' inaction is reasonable—is that Congress' failure to deal with recidivism in the NLRA leaves that subject matter to the states.

APPENDIX

APPENDIX

Wis. Stat. Ann. § 16.75 (8) (West Supp. 1984). The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency. Each waiver shall be entered on the record specified in sub. (1).

Wis. Stat. Ann. § 101.245 (West Supp. 1984). Labor law violators. (1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least 3 separate violations, to have violated the national labor relations act, 29 USC 151 et seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

(2) This list may be compiled from the records of the national labor relations board.

(3) Whenever a new name is added to this list the department shall send the name to the department of administration for action as provided in s. 16.75 (8).

(4) A name shall remain on the list for 3 years.

(5) If any person or firm files a written statement with the department alleging that the person's or firm's name should not be included on this list because the person or firm did not violate that national labor relations act as provided in sub. (i) or that 3 years have passed since the person's or firm's name was included on the list, the department shall hold a hearing on the matter. If the department finds that the allegations in the person's or firm's statement are correct, the department shall notify the department of administration that it should remove the person's or firm's name from the list.

Office-Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRIAL, LABOR AND HUMAN RELATIONS, *et al.*,
Appellants,

v.

GOULD, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1484

WISCONSIN DEPARTMENT OF INDUSTRIAL, LABOR AND HUMAN RELATIONS, *et al.*,

Appellants,

v.

GOULD, INC.,

Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE APPELLANTS

The American Federation of Labor and Congress of Industrial Organizations (" AFL-CIO"), a federation of 95 national and international labor organizations with a total membership of 13,500,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in this Court's rules.

SUMMARY OF ARGUMENT

1. With but two exceptions, this Court's labor law preemption cases have all involved challenges to state laws (whether established legislatively or through common-law adjudication) which prescribe rules of conduct intended to be binding on private parties—including employers, employees and labor organizations involved in a labor dispute—and enforceable through a state judicial or administrative proceeding. In this context, the Court has "announced two doctrines for determining whether state regulations or causes of action are preempted by the National Labor Relations Act," *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983)—the doctrine of *San Diego Unions v. Garmon*, 359 U.S. 236 (1959) and that of *Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132 (1976).

But States act in a variety of ways. With respect to any of these forms of state activity, by establishing conditions for participation in state run programs a State may intend to affect, and may affect, the behavior of participants, and would-be-participants, in the program. Thus, it cannot be said that what, for want of a better term, we will call laws that "directly" regulate private parties—*viz.* laws that prescribe a rule of conduct that is enforceable in a judicial or administrative proceeding—and laws that establish eligibility conditions for participating in state programs are different from one another in kind. Nonetheless, there is a clear intuitive difference in degree—which in appropriate settings this Court has deemed legally dispositive—between direct state regulation of private conduct and state efforts to affect private conduct through contractually-based incentives and disincentives. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983).

At the most general level, the question posed here is the extent to which the preemption rules that have been

developed in the context of direct regulation are transferrable to other settings. In particular, that question arises in the context of a Wisconsin law enunciating the State's decision not to do business with repeat violators of the NLRA. And, the precise issue presented is therefore whether the *Garmon* rule precludes the States from basing their purchasing decisions on a National Labor Relations Board determination that a would-be seller is a labor-law violator.

2. The State argues that the *Garmon* preemption doctrine has no application whatsoever to the state acting as a market participant. In our view, however, this case cannot be so easily disposed of for two independent reasons.

First, the premise of the State's argument is unsound: the NLRA is not, as the State supposes, limited to governing only an employer's relations with its own employees. As this Court has recognized, "[t]he Board has held that a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own. *Austin Co.*, 101 NLRB 1257, 1258-59." *Hudgens v. NLRB*, 424 U.S. 507, 510 n. 3 (1976). That Board holding covers employers acting as buyers and sellers.

Second, the State's argument is not dispositive in any event for certain conduct is "protected against state, but not employer interference," *Machinists v. Wisconsin Emp. Rel. Comm'n.*, *supra*, 427 U.S. at 145 n. 6; that is the entire point of the *Machinists* branch of the preemption doctrine.

3. In equating the type of state action at issue here with the direct regulation involved in *Garmon* and its progeny, the court below obscured analysis of the problem presented by this case. There are at least three respects in which, from the perspective of the labor law preemption doctrine, the type of state activity at issue here is distinct:

First, in deciding whether to enact a law directly regulating private conduct, the State has the option of not becoming involved; an option that is exercised by leaving the conduct unregulated. Non-regulation cannot fairly be said to constitute state support of, or participation in, the conduct in question. When a State ventures outside of the area of direct regulation, however, the State confronts situations in which the option of neutrality does not exist.

Second, as previously noted, Wisconsin has not established any generally applicable rules of conduct that bind private parties within (or outside) the State. Every employer has the choice of competing or not competing for the State's business; only if an employer elects the former option will its conduct be examined to determine if the employer has met each of the conditions for doing business with the State (here, obeying the NLRA).

A third and related distinction between the type of state activity involved here and the type of state activity that has been at issue in the run of preemption cases is that, precisely because the State has not mandated any rules of conduct for private parties intended to be generally binding, there is no state judicial or administrative system for interpreting, developing, and enforcing a state rule or policy in the labor relations context.

Each of these considerations cuts against applying the *Garmon* doctrine by rote to this case.

4. This Court has decided two analogous labor preemption cases, *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519 (1979), and *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235 (1967). The ultimate lesson taught by *New York Telephone* and *Nash* is that state action that takes a form other than direct regulation of private parties raises a myriad of complex preemption questions and that the *Garmon* and *Machinists* doctrines,

which were fashioned to deal with such direct regulation, will not always be transferrable to state actions intended to influence such activity through contractual conditions. This Court's reminder last Term, in addressing the labor law preemption doctrine, that "as in any preemption analysis '[t]he purpose of Congress is the ultimate touchstone,' " *Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4616, 4622 (June 3, 1985), is therefore particularly pertinent here. And a state rule denying state contracts to labor-law violators does not contain any of the indicia of a law Congress intended the NLRA to preempt.

To begin with, in deciding not to do business with recidivist labor-law violators, a State acts as a market participant, and in a manner in which any other market participant is free to act. Moreover, to the extent Wisconsin's decision not to buy from recidivist labor-law violators influences private behavior, that influence will be the product of the amount of purchasing power the State happens to enjoy. In both senses, as the State argues, its actions are no different from a refusal by General Motors to deal with labor-law violators. These are the factors, we believe, that inform this Court's recent decisions sustaining state actions as market participants against claims that the States were burdening interstate commerce. *See, e.g., White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983).

Furthermore, assuming *arguendo* that state market activity may, in certain circumstances, conflict with the NLRA, a decision not to deal with violators of the Act does not do so. Such a decision—unlike the decision in *Nash v. Florida Industrial Comm'n, supra*—does not encourage activity violative of the Act or discourage activity that the Act seeks to protect; rather, such a decision promotes compliance with the NLRA's demands. Appellee suggests, however, that Wisconsin's refusal to deal with labor law violators conflicts with the national

labor policy because the state rule injects a penal provision into an Act which "is essentially remedial." *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10 (1940). See Motion to Affirm at 1. Appellee is mistaken. The NLRA establishes the adverse consequences for violating the Act a court or an administrative agency may decree; the States are therefore not free to add to those consequences (and *a fortiori* are not free to enact punitive sanctions for violations of the Act). But the NLRA does not determine or limit the other adverse consequences that may flow from violating the Act's commands; the Act does not, for example, shield violators from economic retaliation or economic ostracism, no matter how "punitive" such a response may be.

Moreover, appellee's argument ignores the fact that when a recidivist labor-law violator bids on a state contract, the State has only two available choices: the State must either deal or not deal with the violator. There is not a neutral position available to the State, the only alternative to the "penalty" of not dealing, is the reward of dealing. In these circumstances, it is inconceivable that the Act compels the course of conduct that aids the labor-law violator.

As *Nash v. Florida Industrial Comm'n.*, *supra*, shows, the States do not have unlimited power to set conditions on state contracts and benefits that affect the manner in which employers, employees and unions governed by the NLRA conduct themselves. But the foregoing demonstration is, we submit, more than sufficient to show that a State's decision not to deal with labor-law violators does not "conflict[] with . . . federal law or frustrate the federal scheme," *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, 53 L.W. at 4622. Accordingly, the Wisconsin statute at issue here is not preempted.

ARGUMENT

A. At first blush, this case presents "a variant of a familiar theme," *Operating Engineers v. Jones*, 460 U.S. 669, 675 (1983)—a claim that state action is preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* ("NLRA" or "the Act"). But on closer inspection, it becomes apparent that the question presented here is quite different from the preemption questions with which this Court is most familiar, because the nature of the state action at issue here is quite different.

With but two exceptions which we discuss, *infra* at 16-18, this Court's NLRA preemption cases have all involved challenges to state laws (whether established legislatively or through common-law adjudication) which prescribe rules of conduct intended to be binding on private parties—including employers, employees and labor organizations involved in a labor dispute—and enforceable through a state judicial or administrative proceeding—a proceeding designed to secure compliance with the underlying norm. The State was acting, in short, to regulate the conduct of private parties through the classic governmental means to that end.

In this context, the Court has "announced two doctrines for determining whether state regulations or causes of action are preempted by the National Labor Relations Act." *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). The first—the doctrine of *San Diego Unions v. Garmon*, 359 U.S. 236 (1959)—addresses state regulation of conduct that is or may be regulated by the Act; the "concern[] [is] with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing re-

medial schemes." *Id.* at 242.[1] The second preemption doctrine—that of *Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132 (1976)—"proscribes state regulation and state law causes of action concerning conduct that Congress intended to be unregulated." *Belknap, supra*, 463 U.S. at 498.

But States act in a variety of ways. States deliver goods and services; States purchase goods and services for their own use and for the use of their citizens; and States administer a variety of programs through which money or other benefits are distributed to individuals and businesses. With respect to any of these forms of state activity, by establishing conditions for participation in state run programs a State may affect the behavior of participants, and would-be participants, in the program. Indeed, such conditions often are adopted for that very purpose and may have a more powerful effect

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[1] The *Garmon* doctrine actually encompasses several discrete rules, each reflecting a separate concern with state regulation of conduct to which the NLRA may apply.

First, *Garmon* proscribes state regulation of conduct affirmatively protected by the Act; here "preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." *Brown v. Hotel and Restaurant Employees*, —— U.S. ——, 52 L.W. 5042, 5045 (July 2, 1984).

Second, *Garmon* proscribes state regulation of conduct prohibited by the Act; this is because, "[t]he technique of administration, the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the NLRA." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971); *see also Garner v. Teamsters Union*, 346 U.S. 485 (1953).

Third, and finally, *Garmon* proscribes state regulation of conduct arguably protected or prohibited by the Act; this is a "prophylactic rule," *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 187 (1978), required because of the impracticality of this Court "proceed[ing] on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy," *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 289.

on the conduct of private parties than even a criminal law. Thus, it cannot be said that what, for want of a better term, we will call laws that "directly" regulate private parties—*viz.* laws that prescribe a rule of conduct that is enforceable in a judicial or administrative proceeding—and laws that establish eligibility conditions for participating in state programs are different from one another in kind in either their purposes or their effects. Nevertheless, there is a clear intuitive difference in degree—which in appropriate settings this Court has deemed legally dispositive—between direct state regulation of private conduct and state efforts to affect private conduct through contractually-based incentives and disincentives. As the Court stated in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549-550 (1983):

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley* v. *Valeo*, 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Id.*, at 93-108. *Harris* v. *McRae*, 448 U.S. 297 (1980), and *Maher* v. *Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.
>
> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, *supra*, at 316. . . . [T]he Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S., at 318. As we said in

> *Maher*, "[c]*onstitutional concerns are greatest when the State attempts to impose its will by force of law* . . . ." 432 U.S., at 476. Where governmental provision of subsidies is not " 'aimed at the suppression of dangerous ideas,' " *Commarano* [v. *United States*], 358 U.S., at 513, *its "power to encourage actions deemed to be in the public interest is necessarily far broader." Maher, supra*, at 476. [Emphasis added.]

At the most general level, the question posed here is the extent to which the preemption rules that have been developed in the context of direct regulation are transferrable to other settings. In particular, the question arises here in the context of a Wisconsin law enunciating the State's decision not to do business with repeat violators of the NLRA.

There is no doubt that if Wisconsin, as a matter of state law, had decreed that employers and unions are to obey the requirements of the NLRA, had established state-law sanctions for repeated violations of that general norm and had created a judicial or administrative cause of action to make that norm enforceable, such a state law would be preempted. This much was settled as long ago as *Bethlehem Co. v. State Board*, 330 U.S. 767 (1947), and was expressly reaffirmed in *Garmon*: "When it is clear or may fairly be assumed that the activities which a State purports to regulate . . . constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244.

But Wisconsin has *not* mandated any rule of conduct binding on all employers within Wisconsin, and *a fortiori* has not created any cause of action making such a rule judicially or administratively enforceable; rather, Wisconsin has made a decision as to whom the State will do business with, a decision which, like any purchasing decision, has consequences for—and may influence the behavior of—employers who seek state business. The precise issue here is therefore whether the *Garmon* rule precludes the States from basing their purchasing de-

cisions on a National Labor Relations Board determination that a would-be seller is a labor-law violator.[2]

B. The State argues that the *Garmon* preemption doctrine has no application whatsoever to the state acting as a market participant. According to the State:

> Congress has not legislated in the area of market participant choices. General Motors can elect not to deal with labor law recidivists without offending the NLRA, for the NLRA governs General Motors' relations with its employees, not its trading partners. Wisconsin, as a matter of its sovereignty, enjoys the same privilege. [Jur. Stat. at 18.]

In our view, however, this case cannot be so easily disposed of for two independent reasons.

First, the premise of the State's argument is unsound: the NLRA is not limited to governing only an employer's "relations with its employees." In particular, § 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7". This command on its face goes beyond the employer's own employees and, indeed, the term "employee" is expressly defined to mean "any employee, and shall not be limited to the employees of a particular employer." NLRA § 2(3).[3] Thus, as this Court has recognized, "[t]he Board has held that a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own. *Austin Co.*, 101 NLRB 1257, 1258-59." *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976).

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[2] No claim is made here that the *Machinists* doctrine, which applies where Congress intended an area to be unregulated by any authority, applies in this fact situation. *See also* pp. 16-17, *infra*.

[3] *See also* § 2(9): "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee."

The *Austin Co.* case which the Court cited in *Hudgens* is the seminal decision in a line of NLRB cases that addresses the extent to which actions taken by an employer in its capacity as trading partner violate the Act. In *Austin Co.*, the employer cancelled a contract under which a security agency was to provide guards for the employer's property; the employer did so because the guards being used by the contractor were not members of the union that represented the employer's employees. The Board held that the employer had acted unlawfully in cancelling the contract for that reason. In subsequent cases, the Board has found violations in an employer's refusal to allow a repairman onto the employer's premises to do repair work for which the employer had contracted where the employer's ground for refusal was that the repairman was a union activist,[4] or was wearing a union insignia.[5] And in one case especially noteworthy for present purposes, the Board found that a credit union had acted unlawfully in establishing and enforcing a rule which precluded employees of organized employers from participating in the credit union.[6] Thus, while the NLRA speaks principally to the relationship between an employer and its own employees—and while in most respects the Act leaves an employer's actions as purchaser unregulated—Wisconsin overstates the case in contending that "the NLRA governs [an employer's] relations with its employees, not its trading partners."

Second, even if, *arguendo*, it were true that the Act places no limits on the trading decisions of private parties, it would not *necessarily* follow that the States would enjoy a like freedom under the preemption doctrine. This

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[4] *West Texas Utilities Co.*, 108 NLRB 407 (1954), *enf'd* 218 F.2d 824 (5th Cir. 1985).

[5] *Fabric Services, Inc.*, 190 NLRB 540 (1971). *See also Holly Manor Nursing Home*, 235 NLRB 426 (1978).

[6] *AM Steigerwald Co.*, 236 NLRB 1512 (1978).

Court's decisions make clear that, at least in the regulatory context, the limitations imposed on state action by the preemption doctrine are not coterminous with the limitations imposed on private action by the substantive provisions of the NLRA. To the contrary, certain conduct is "protected against state, but not employer interference," *Machinists v. Wisconsin Empl. Rel. Comm'n*, *supra*, 427 U.S. at 145 n.6; that is the entire point of the *Machinists* branch of the preemption doctrine. Thus, even if it were true that the Act left private parties wholly unregulated with respect to their conduct as traders, that fact would pose—but would not necessarily answer—the question whether the States enjoy a like freedom.

C. If the State's analysis is insufficient to resolve this case, the analysis of the court of appeals is even less helpful. That court viewed this case as a simple case of direct state regulation of private conduct and thus a case easily within *Garmon's* reach:

> The Wisconsin legislature seeks to prohibit activity also prohibited by the NLRA. *Garmon*, *supra*, teaches that state regulation of both activity protected and prohibited by the NLRA is preempted. [J.S. App. at 16.]

And in a single sentence the court of appeals disposed of the fact that the State was acting as a purchaser, arguing that the Commerce Clause cases on which the State relied to justify its claim of freedom to act as a market participant "do not address the issue before us, the range of state *regulation* allowable when Congress has legislated decisively in the area." J.S. App. at 22 (emphasis added).

In equating the type of state action at issue here with the direct regulation involved in *Garmon* and its progeny, the court below obscured analysis of the problem presented by this case. There are at least three respects in which, from the perspective of the preemption doctrine, the type of state activity at issue here is distinct.

First, in deciding whether to enact a law directly regulating private conduct, the State has the option of not becoming involved; an option that is exercised by leaving the conduct unregulated. Non-regulation cannot fairly be said to constitute state support of, or participation in, the conduct in question. *Cf. County of Washington v. Gunther*, 452 U.S. 161, 169 (1981). In that critical sense, the State's posture is one of neutrality. When a state ventures outside of the area of direct regulation, however, the State confronts situations in which the option of neutrality does not exist.

The point is best made by a simple hypothetical. In the course of a labor dispute, a union urges consumers to boycott the products of a struck employer who is continuing production during the course of the strike by using persons hired to replace the striking workforce.[7] The State must decide whether to purchase the employer's struck goods. In such circumstances, there is no neutral position available to the State: if the State ignores the boycott and purchases from the employer, it aids the employer and disadvantages the union; if the State refuses to purchase, the reverse is true. Thus, the question to which the preemption doctrine has responded—when should the State leave private conduct alone—is not always a relevant question in the regulatory context.

Second, as previously noted, Wisconsin has not established any generally applicable rules of conduct that bind private parties within (or outside) the State. No legal duty enforceable through judicial or administrative proceedings is imposed on any employer. Every employer has the choice of competing or not competing for the State's business; only if an employer elects the former

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[7] This is not a wholly-hypothetical example. *See J.P. Stevens & Co. v. Jackson*, 85 Lab. Cases ¶ 10,980 (N.D. Ga. 1978) (refusal of City of Atlanta to purchase from J. P. Stevens until the company "cease[s] and desist[s] from . . . discriminatory and illegal practices).

option will its conduct be examined to determine if the employer has met each of the conditions for doing business with the State (here, obeying the NLRA). The fact that the State has not established an overall legal rule in the usual sense is significant, we submit, because "the constitutional principles of preemption, in whatever particular field of law they operated, are designed with a common end in view: to avoid conflicting regulation of conduct by various offiical bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at 285. And, the danger of "conflicting regulation" is at its greatest when a State prescribes normative rules of conduct intended to bind private parties.

A third and related distinction between the type of state activity involved here and the type of state activity that has been at issue in the run of preemption cases is that, precisely because the State has not mandated any rules of conduct for private parties intended to be generally binding, there is no state judicial or administrative system for interpreting, developing, and enforcing a state rule or policy in the labor relations context. This is significant because, as Justice Harlan observed, a "primary factor in the enactment of the NLRA" was the "perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at 286. Consequently, "[t]he principle of preemption that informs our general national labor law was born of this Court's efforts . . . to delimit the state and federal judicial authority over labor disputes," *id.* Indeed, "there is general agreement on the proposition that the 'animating force' behind the doctrine is a recognition that the purposes of the federal statute would be defeated if state and federal courts were free, without

limitation, to exercise jurisdiction over activities that are subject to regulation by the NLRB. *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 527 (1979). These concerns are not implicated by state decisions of the type involved here.

For all these reasons, the court of appeals erred in simply ignoring the distinction between regulation and other types of state activity.

D. This Court has decided two analogous labor preemption cases: *New York Tel. Co.*, *supra*, and *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235 (1967). Those two decisions are instructive on the problem presented here.

In *New York Telephone* an employer challenged the State's decision to pay unemployment compensation to strikers; the employer argued that New York is precluded from doing so by the *Machinists* rule requiring the States to "allow[] the free play of economic forces to operate during the bargaining process." 440 U.S. at 531. The Court rejected the employer's challenge and upheld New York's action. The plurality opinion began by noting some of the differences between the employer's challenge in that case and the Court's prior preemption cases:

> Unlike . . . *Machinists*, as well as the main body of labor preemption cases, the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public . . . [T]he general purpose of the program is not to regulate the bargaining relationship . . . but instead to provide an efficient means of insuring employment security in the State. It is therefore clear that even though the statutory policy underlying . . . *Machinists* lends support to petitioners' claim, [its] holdings . . . are not controlling. The Court is being

> asked to expand the doctrine of labor law preemption into a new area. [440 U.S. at 532-533.]

The Court found it unnecessary to explain these differenses fully because the intertwined legislative histories of the NLRA and the Social Security Act demonstrate that Congress intended to leave the States free to decide whether to provide unemployment compensation to strikers. *See id.* at 537-545. But the fact of the matter is that although the employer in *New York Telephone* complained that the State had "altered the economic balance between labor and management," *id.* at 532, the State was necessarily required, in order to administer its unemployment compensation program, to decide whether persons who are out of work because of a strike qualify for benefits, and any decision the State made would equally affect that "economic balance." Thus, even absent the dispositive legislative guidance that was available, the *Machinists* principle simply did not fit that case.

Nash v. Florida Industrial Comm'n. illustrates a very different aspect of the preemption problems generated by a state decision to impose labor-related conditions for participation in a state-run program. At issue was Florida's determination to deny unemployment compensation to an individual who while unemployed filed an unfair labor practice charge with the NLRB challenging her employer's action in terminating her employment. Unlike the situation in *New York Telephone*, the State could have paid benefits to the individual without siding with either the employer or the individual in the case before the Labor Board, and unlike *New York Telephone*, the effect of Florida's eligibility rule was to discourage an action protected by federal law—filing a charge with the NLRB. In these circumstances, the Court unanimously concluded that the NLRA precludes the States from using the filing of an unfair labor practice charge as a ground for denying unemployment compensation:

> It appears obvious to us that the financial burden which Florida imposes will impede resort to the Act

> and thwart congressional reliance on individual action. A national system for implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. [389 U.S. at 239.] [8]

E. The ultimate lesson taught by *New York Telephone* and *Nash* is that state action in forms other than direct regulation raises a myriad of complex preemption questions and that the *Garmon* and *Machinists* doctrines, which were fashioned to deal with direct regulation of private activity, will not always be transferrable to state actions intended to influence such activity through contractual conditions. The law with respect to this latter

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[8] The line between *Nash* and *New York Telephone* is similar to a distinction this Court has drawn in related contexts. For example, in *Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that the government is free to deny financial assistance to an indigent woman desiring (or in need of) an abortion, even though such assistance is provided for other medical procedures, including the delivery of a child. The Court concluded that there is no "constitutional obligation . . . to subsidize abortions," *McRae, supra*, 448 U.S. at 297.

At the same time the Court indicated that the government may *not* deny all medicaid benefits or general welfare assistance to one who has had an abortion as such a denial would penalize the exercise of the right to choose an abortion. *McRae, supra*, 448 U.S. at 317 n.19; *Maher, supra*, 474-475 n.8. *Cf. also, Buckley v. Valeo*, 424 U.S. 1, 57 n.5 (1976) (government may impose limitations on a candidate's free speech rights as a condition of the candidate's receipt of public funds that could not be imposed on candidates generally); *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) ("our cases have long recognized that Congress may fix the terms on which it shall disburse federal money"); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (employer not required to provide disability benefits to women disabled because of pregnancy or childbirth, but employer may not deprive such women of seniority as the latter constitutes "a substantial burden" on the exercise of the underlying right rather than the denial of a benefit).

set of issues is in an embryonic state, and we submit all that can be said with confidence at this early stage in the law's development is that the limitations on state authority "are not susceptible of delimination by fixed metes and bounds," and "can be rendered progressively clear only by the course of litigation." *Weber v. Anheuser-Bush, Inc.*, 348 U.S. 468, 480-81 (1955); *see also Machinists v. Gonzales*, 356 U.S. 617, 619 (1958). With that in mind, we turn from the broader setting in which this case is located, to the narrow question posed here: may a State refuse to deal with labor-law violators? As we proceed to demonstrate, that question must be answered in the affirmative.

Just last Term, in addressing the labor law preemption doctrine, the Court reminded that "as in any preemption analysis '[t]he purpose of Congress is the ultimate touchstone.'" *Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4616, 4622 (June 3, 1985). And the Court set forth the basic approach for ascertaining Congress' intent:

> Where the preemptive effect of federal enactments is not explicit, courts sustain a local regulation unless "it conflicts with a federal law or would frustrate the federal scheme or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." [*Id.*]

As we now show, a state rule denying state contracts to labor-law violators does not contain any of the indicia of a law Congress intended the NLRA to preempt.

To begin with, in deciding not to do business with recidivist labor-law violators, a State acts as a market participant, *and in a manner in which any other market participant is free to act.* Whatever the limits that the NLRA imposes on the actions of employers as market participants, see pp. 17-18, *supra*, there is no conceivable basis for believing that the Act precludes an employer

from declining to do business with labor-law violators; no provision of the Act remotely touches such conduct. Thus, Wisconsin here has, as the State argues, made a decision that General Motors is free to make.

Moreover, to the extent Wisconsin's decision not to buy from recidivist labor-law violators influences private behavior, that influence will be the product of the amount of purchasing power the State happens to enjoy. In this regard, too, the State is indistinguishable from General Motors or any other factor in the market; indeed, in most markets there will be at least some private participants with greater purchasing power than any single State.

These are the factors we believe, that inform this Court's recent decisions sustaining state actions as market participants against claims that the States were burdening interstate commerce. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983).[9] In these cases, the Court has permitted States, in making purchases and sales, to discriminate against out-of-state customers, even though it is well-settled that the Commerce Clause precludes *direct regulation* that discriminates against or disadvantages out-of-state buyers or sellers. The Court has understood that state actions as a market participant do not jeopardize the values of the Commerce Clause as does state regulation; rather the Court has concluded that "[w]hen the State acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise." *United Building and Construction Trades Council v. Mayor of Camden*, —— U.S. ——, 52 L.W. 4187, 4191 (Feb. 21, 1984).

[9] The same understanding seems to lie at the root of the Court's decisions holding that the Sherman Act is applicable to state "proprietary activity" but not state "regulation." *See Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1983).

Furthermore, assuming *arguendo* that state market activity may, in certain circumstances, conflict with the NLRA, a decision not to deal with violators of the Act does not do so. Such a decision—unlike the decision in *Nash v. Florida Industrial Comm'n*, *supra*—does not encourage activity violative of the Act or discourage activity that the Act seeks to protect; rather, such a decision promotes compliance with the NLRA's demands. Appellee suggests, however, that Wisconsin's refusal to deal with labor law violators conflicts with the national labor policy because the state rule injects a penal provision into an Act which "is essentially remedial." *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10 (1940). See Motion to Affirm at 1. Appellee is mistaken.

The NLRA establishes the adverse consequences for violating the Act a court or an administrative agency may decree; the States are therefore not free to add to those consequences (and *a fortiori* are not free to enact punitive sanctions for violations of the Act.)[10] But the NLRA does not determine or limit the other adverse consequences that may flow from violating the Act's commands; the Act does not, for example, shield violators from economic retaliation or economic ostracism, no matter how "punitive" such a response may be. It would have been surprising indeed for Congress to have made it unlawful for a market participant to decide not to do business with an employer who has repeatedly violated the Act. And it would have been nothing less than startling for Congress to have decided to protect labor-law violators from a *State's* refusal to deal with Congress did not provide protection from a like refusal by any other factor in the market. For a State—unlike a private market partici-

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[10] *E.g.*, *Teamsters Union v. Morton*, 377 U.S. 252, 260-61 (1964) (State may not add punitive damages to remedies provided in the Act for a secondary boycott violative of § 8(b)(4); *see generally Garmon*, *supra*, 359 U.S. at 247 ("to allow the State to grant a remedy which has been withheld from the National Labor Relations Board only accentuates the danger of conflict").

pant—has a "sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal," *Reeves Inc. v. Stake*, *supra*, 447 U.S. at 438 n. 10, and the fair assumption is that Congress would have been especially reluctant to trench upon that "sovereign interest".

Moreover, appellee's argument ignores the fact that when a recidivist labor-law violator bids on a state contract, the State has only two available choices: the State must either deal or not deal with the violator. If a State decides not to deal, the State does not add to the adverse consequence of having violated the law. If, on the other hand, the State decides to deal with the violator, the State becomes associated with the violator and may actually enable him to profit from his misdeeds (if the violations have enabled the violator to reduce his labor costs and thus account for the violator's success in bidding for the State's business) or may provide revenue that enables the violator to continue his wrongs.[11] There is not a neutral position available to the State; the only alternative to the "penalty" of not dealing, is the reward of dealing. In these circumstances, it is inconceivable that the Act compels the course of conduct that aids the labor-law violator.

As *Nash v. Florida Industrial Comm'n.* shows, the States do not have unlimited power to set conditions on state contracts and benefits that affect the manner in which employers, employees and unions governed by the NLRA conduct themselves. *See also Regan v. Taxation With Representation of Wash.*, *supra*. But the forego-

[11] As the Court noted last Term, "One of the ultimate goals of the Act was the resolution of the problem of 'depress[ed] wages and profits' . . . Congress hoped to accomplish this by establishing procedures for more equitable private bargaining." *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, 53 L.W. at 4624. It is thus to be expected that an employer who deprives his employees of their rights under the Act may succeed in keeping wages depressed.

ing demonstration is, we submit, more than sufficient to show that a State's decision not to deal with labor-law violators does *not* "conflict[] with . . . federal law or frustrate the federal scheme," *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, 53 L.W. at 4622. Accordingly, the Wisconsin statute at issue here is not preempted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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MOTION FILED
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No. 84-1484

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IN THE

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OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, *et al.*,
Appellants,

v.

GOULD INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLEE

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

36 pp

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States, the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* urging affirmance of the Seventh Circuit's judgment. In support of this motion, the Chamber states as follows:

1. This motion is necessitated by the refusal of the Assistant Attorney General of Wisconsin, counsel of record for Appellants, to consent to the filing of a brief

amicus curiae by the Chamber. Counsel for Gould Inc., the Appellee, has consented to the Chamber's brief.

2. The Chamber is a federation consisting of approximately 180,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court,[1] including the other labor preemption case pending before the Court this term (*Golden State Transit Corporation v. City of Los Angeles*, No. 84-1644).

3. The instant case presents the issue of whether a state may enforce statutes barring an employer from doing business with the state if the employer has violated the National Labor Relations Act ("the Act" or "NLRA"). Specifically, this Court must decide whether the federal Act preempts Wisconsin statutes which prohibit the State's departments and agencies from purchasing any product manufactured or sold by an employer that has been found guilty of three separately enforced violations of the NLRA.

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[1] E.g., *Allis-Chalmers Corp.* v. *Lueck*, —— U.S. ——, 85 L. Ed. 2d 206 (1985); *Trans World Airlines v. Thurston*, —— U.S. ——, 83 L. Ed. 2d 523 (1985); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979); *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267 (1974).

4. These issues are of vital concern to the Chamber and its members, many of whom do substantial amounts of business with state and municipal government agencies and departments. For if Wisconsin may debar government contractors for three years because of three labor law violations, then there is no reason why the hundreds of state and municipal governments throughout the country cannot impose their own debarment rules based on their own ideas about what national and local labor policy requires. Thus, Chamber members, like employers everywhere, may find themselves foreclosed from substantial markets for varying periods of time (three years, five years, ten years, etc.) for whatever labor-relations conduct those government entities deem worthy of punishment (three labor law violations, one labor law violation, being the object of a strike, etc.). Moreover, it is not just adjudged labor law violators who will suffer under such legislation, for the Wisconsin statutes bar not only direct purchases from labor law violators but also the purchase of any product which contains a component manufactured by the debarred company. Consequently, even employers with spotless labor records will inevitably find it necessary at times to disrupt established business relationships and alter modes of production or procurement in order to maintain their eligibility for state and local government contracts.

5. The ramifications of this Court's ruling in the present case will plainly transcend the narrow question of whether Wisconsin may refuse to deal with three-time labor law violators. The presence in the case of three *amici curiae* supporting the State of Wisconsin attests to the importance of the issues to state and local governments and to labor organizations. The issues are equally important to employers in the United States, and as a representative of many of those employers, the Chamber urges that it be permitted to present their views.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae* in support of Gould Inc.

Respectfully submitted,

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Dated: September 10, 1985

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLEE

INTEREST OF THE *AMICUS CURIAE*

A statement describing the Chamber of Commerce of the United States of America ("the Chamber") and its interest in this case is set forth in the preceding motion for leave to file this *amicus curiae* brief.

SUMMARY OF THE CASE

In the case before the Court for review, the District Court (576 F. Supp. 1290) and the United States Court of Appeals for the Seventh Circuit (750 F.2d 608) both held that Wisconsin's "Labor Law Violators List" stat-

utes, which blacklist labor law violators, were preempted by the National Labor Relations Act ("NLRA" or "the Act"). The decisions were based on a simple, stipulated record which is summarized briefly below.

In 1980 the Wisconsin legislature enacted two new provisions (Wisc. Stats. §§ 101.245 and 16.75(8)) which are commonly referred to as the "Labor Law Violators List" statutes. The statutes require the State Department of Industry, Labor and Human Relations to maintain a list of employers who have had three or more NLRB unfair labor practice findings affirmed by three different final decisions of a federal court of appeals within the preceding five years (576 F. Supp. at 1292). The statutes apply whether or not the labor law violations occurred in the State of Wisconsin and whether or not any citizen or resident of Wisconsin is in any way affected by the employer's unfair labor practices. Indeed, in this case all of Gould's unfair labor practices were committed in states other than Wisconsin (750 F.2d at 210).

Once an employer's name is placed on the list, it remains there for three years. During that time, the departments and agencies of the State are barred from purchasing "any product known to be manufactured or sold" by the employer (Section 16.75(8)). Further, at least in this case, the State has construed the statute to preclude the State from purchasing products from any other seller where those products contain component parts produced by the debarred company (576 F. Supp. at 1293).

On August 25, 1982, Gould was notified that its name was being placed on the labor law violators list, that its contracts with the State would be canceled and that it would be debarred from bidding for State procurement contracts until July 1, 1985. The State also notified all current and potential State vendors that they could not sell products to the State of Wisconsin which contained Gould-produced components (576 F. Supp. at 1293). All

of these actions were based on the fact that four of Gould's twenty separate and autonomous divisions had been the subject of court-enforced findings of NLRA violations within the preceding five years. By the time Gould was placed on the labor law violators list, Gould had remedied all the violations of the Act and all four of those divisions had been sold (*id.*).

In early 1983, Gould sought and obtained a preliminary injunction ordering the State of Wisconsin [1] to honor Gould's existing contracts, to entertain future bids by Gould and to revoke all notices to State agencies and vendors that Gould was barred from doing business with the State (576 F. Supp. at 1292). Thereafter, the District Court issued a permanent injunction based on its conclusion that the Wisconsin statutes were preempted by the National Labor Relations Act because they impermissibly added a penalty for violation of the NLRA and burdened Gould's federal appeal rights under the Act. Although the Court of Appeals found that the Wisconsin statutes did not impermissibly burden Gould's right to judicial review of NLRB decisions, it affirmed the District Court's preemption conclusion on the basis of the penalty imposed by the statutes. The matter is now before this Court on that preemption issue.

SUMMARY OF ARGUMENT

This Court's preemption decisions have made it clear that Congress enacted the NLRA to establish a single, consistent scheme governing labor-management relations for the nation and, to that end, to exclude state and local actions based on their own parochial views of proper labor policy. An integral part of Congress' regulatory scheme was its decision to impose certain remedies for

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[1] The District Court dismissed all but the individual State official defendants on Eleventh Amendment immunity grounds. For ease of reference, however, we will treat the State of Wisconsin as the appellant before this Court.

violations of the Act and to withhold other remedies, including such punitive measures as debarment from government contracting.

The remedies Congress chose not to impose upon violators of the NLRA are as critical to the scheme and purpose of the Act as are the ones it chose to impose. Accordingly, it does not avail the State of Wisconsin to argue that its debarment remedy does no more than supplement the NLRA by imposing an additional sanction in furtherance of that Act's policy of prohibiting certain employer conduct. Such an argument is based upon too narrow a reading of the purpose of the NLRA. The NLRA was not enacted simply to prohibit employer conduct. Rather, the Act prohibits and remedies certain conduct as a means (not an end) of ensuring that the Act's main purpose is achieved—i.e., that labor and management will engage in the process of free collective bargaining to reach a voluntary agreement on employee working conditions. That voluntary bargaining process is tough enough to achieve without further burdening it with the imposition of draconian penalties, such as debarment, for Labor Act violations. Accordingly, the withholding of such penalties by Congress is as much in furtherance of the Act's basic purpose as is the imposition of specific remedies for Labor Act violations, and the imposition of such penalties by state and local governments (such as the State of Wisconsin) is preempted lest they frustrate the NLRA's single, consistent, national labor policy favoring voluntary collective bargaining.

The tougher issue in this case, and an issue of first impression for the Court, is whether the State's action here avoids preemption simply because the State is allegedly acting as a "market participant" rather than as a direct regulator of employer labor relations conduct. The State of Wisconsin argues that it is free to select from whom it will purchase goods and services, and that, just like any private purchaser, it may decide with whom it will

do business. And, says the State, because a private company could decide not to do business with a labor law violator, so can the State of Wisconsin.

We respectfully submit that the State's argument is overly simplistic and must fail. The fact that a private employer may choose to avoid doing business with a labor law violator misses the point. The Supremacy Clause of the Constitution prohibits state and local government action that is inconsistent with an act of Congress—not private employer action. Private employer action is regulated, if at all, by the terms of the statutes Congress enacts. State action is limited by the constitutional dictate that state and local governments may not interfere with the scheme Congress has chosen to regulate private employer conduct.

Moreover, "debarment" is, by definition, only a market participation decision—i.e., a decision not to do business with another. If states may make their "market participation decisions" free of any constitutional challenge, then, by definition, all states may impose a debarment penalty no matter how frustrating that may be to the goals of the Constitution or the laws enacted by Congress. Clearly the "market participation" defense cannot be used to produce that result.

The "market participant" doctrine is relevant to the constitutional question of whether the state's market decisions create trading barriers and thus violate the Commerce Clause, but it is not relevant to challenges of state action under other provisions of the Constitution, including, as in the instant case, the Supremacy Clause. The Supremacy Clause dictates that the laws of Congress (such as the NLRA) shall be supreme and shall preempt inconsistent state action. It matters not whether that action takes the form of direct regulation or indirect regulation by use of a state's purchasing power. In essence, all the State's contention establishes in this case is that if

Congress had never enacted the NLRA, the State's decision to bar labor law violators from selling to the State might not violate the Constitution.

Further, the debarment statutes at issue here would not meet even the Commerce Clause definition of legitimate and constitutionally permissible "market participation" decisions. Specifically, Wisconsin's decisions to debar have nothing to do with purchasing decisions and everything to do with regulating conduct generally. The debarment statutes have nothing to do with the price or quality of goods, they accomplish nothing for Wisconsin industry or its working citizens and they debar not only labor law violators but other employers who do business with those violators. In sum, the State of Wisconsin has acted as a broad regulator of employer conduct, not as a simple "market participant."

Finally, if Wisconsin wins this case, every state and local government in the land could enact its own statutes or ordinances debarring labor law violators (one-time, three-time or ten-time violators), employers who lawfully lock out employees, employers whose unions have violated the NLRA, employers subject to a strike, employers who don't have collective bargaining agreements etc., etc., etc. In sum, the single, consistent, nationwide labor policy sought by Congress when it enacted the NLRA could become hundreds of separate and conflicting policies.

For the foregoing reasons, more fully explained below, we respectfully submit that the Wisconsin debarment statutes at issue in this case should be struck down as inconsistent with the NLRA and, thus, as violative of the Supremacy Clause of the Constitution.

ARGUMENT

This case presents the Court with a slightly different, but clearly not dispositive, twist on the doctrine of labor preemption—whether a state's blacklisting of federal labor law violators from direct and indirect government contracting is immune from preemption because the state is acting through the mode of market participation rather than direct regulation of parties' conduct. As we show below, Wisconsin's sanctions against three-time labor law violators are foreclosed by traditional preemption principles developed by this Court, and the fact that those sanctions are imposed through the State's procurement powers does not change that result.

A. The Wisconsin Statutes Are Preempted Under Traditional Preemption Principles

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court effected a "reorientation of [the labor] preemption doctrine." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 293-294 (1971). That reorientation involved a review of the federal premises underlying the exclusive jurisdiction of the NLRB and the announcement of a rule that the courts were henceforth to apply in determining when the National Labor Relations Act precludes states from acting on matters which the Act commits to the NLRB:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

359 U.S. at 244. Indeed, the *Garmon* Court held that once "the Board decides . . . that conduct is protected by § 7 or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction" (*id.* at 245).

Application of that straightforward standard to the instant case admits of only one conclusion. The "activity" at which the Wisconsin statutes are aimed is conduct which undeniably constitutes an unfair labor practice under the NLRA. By definition, the statutes do not operate except upon three NLRB and appellate court determinations that an employer has violated the Act, and Wisconsin has conceded that the purpose of the statutes is to discourage federal labor law violations by employers (576 F. Supp. at 1297; 750 F.2d at 611). Accordingly, under the plain language of this Court's *Garmon* rule, Wisconsin should be foreclosed from acting with respect to these activities.

To be sure, the Court has held that the general *Garmon* rule cannot be applied mechanistically and that the Court must determine the scope of that rule by "examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. Carpenters*, 430 U.S. 290, 297 (1977). Indeed, *Garmon* itself recognized that the states' power to act is not withdrawn "where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, *supra*, 359 U.S. at 243-244.

Wisconsin asserts that its actions fall within these *Garmon* exceptions because the question of whether Gould and Wisconsin do business together is a "peripheral concern" of the NLRA and because the State has a substantial interest in choosing its trading partners (Wisconsin Brief at 18-19, 44-46). But Wisconsin simply misses the point with that contention. In determining whether state action is permitted by the "peripheral concern" and "deeply rooted local feeling" exceptions, this Court has

consistently focused on the state's interest in controlling the *conduct being regulated*, not on the method used to regulate. For example, in *Garmon* itself the Court phrased the test in terms of whether the "activity regulated" was a peripheral concern of the NLRA or whether the "regulated conduct" touched deeply rooted local interests (359 U.S. at 243-244). Indeed, the *Garmon* Court specifically stated that "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." 359 U.S. at 243.[2]

In short, Wisconsin's interest in choosing its trading partners is not the pertinent question. It has chosen not

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[2] This Court's other decisions have been similarly focused. *E.g.*, *Farmer v. Carpenters, supra*, 430 U.S. at 297 (state interest in protecting citizens from outrageous conduct intentionally inflicting emotional distress); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61-62 (1966) (Michigan's " 'overriding state interest' in protecting its residents from malicious libels"); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (state interest in the maintenance of domestic peace by regulating violence and imminent threats to public order). Although the *Russell* opinion itself is not free from ambiguity in terms of the rationale for finding no preemption, this Court has subsequently made clear that preemption was not appropriate in *Russell* because the case involved violence and threats of violence. *Garmon, supra*, 359 U.S. at 247; *Lockridge, supra*, 403 U.S. at 297 n.7.

Moreover, courts must look to the realistic substance of a state's action, rather than the label placed on it, in determining the validity of that action. In *Lockridge*, for example, the Court held that a state court action was not saved from preemption merely because the complaint charged the defendant union with a breach of contract (based on the union's constitution) in suspending the plaintiff from membership rather than with an unfair labor practice in procuring his dismissal. The Court stated (403 U.S. at 292):

> It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. . . .
>
> . . . At bottom, of course, the Union's action in procuring [plaintiff's] dismissal from employment is the conduct which Idaho courts have sought to regulate.

to trade as its *means* of regulating unfair labor practice conduct.[3] Thus, in order to sustain its contention that its statutes fall within these *Garmon* exceptions, Wisconsin must convince this Court that the activities at which those statutes are directed—the commission of unfair labor practices—are a peripheral concern of the NLRA and are a permissible subject of deeply rooted local interest.

To pose this issue is to answer it. Violations of the NLRA are an obvious and vital concern of the Act, and Wisconsin has no cognizable local interest in regulating them. Although the State of Wisconsin may, *in fact*, have "a deeply rooted interest in compliance with the labor law," as it asserted in the Court of Appeals (750 F.2d at 611), that is *precisely* the "local interest" which Congress meant to override when it passed the National Labor Relations Act. See, e.g., *Lockridge*, *supra*, 403 U.S. at 286 (the primary factor in the development of the NLRA was the "perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict. . . ."); *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953) (Congress considered centralized administration of the Act necessary, *inter alia*, to avoid

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[3] Even if a state's interest in choosing its trading partners might be a proper consideration in preemption analysis in other contexts, any alleged Wisconsin interest in that area can only be deemed illusory in the instant case. As we discuss more fully in Section B, *infra*, Wisconsin did not enact the statutes *sub judice* in order to protect the economic or physical well-being of its citizens. Indeed, there is even no nexus between the Wisconsin statutes and any direct labor relations interest of the State's citizenry—the statutes apply irrespective of whether the unfair labor practices were committed within the state or without and irrespective of whether the company division violating the Act even operates within or seeks to sell to the State of Wisconsin. Thus, Wisconsin's only interest in this case is in imposing its view of proper labor relations policy and sanctions—an interest that is foreclosed from action by the NLRA.

the diversities and conflicts that might result from local attitudes toward labor controversies).

Wisconsin asserts, however, that its debarment statutes should not be preempted because its debarment remedy does not conflict or interfere with the NLRA, but rather, supplements and enhances the NLRA remedial scheme. We respectfully submit that Wisconsin's debarment statutes do impermissibly interfere with the Act and that the State's contention to the contrary is based upon too narrow a reading of the NLRA.

First, the primary goal of the NLRA is not, as the State and its supporting *amici* seem to argue, the elimination of employer and union unfair labor practice conduct. The fundamental and ultimate goal of the Act is to encourage collective bargaining—a process by which management and labor meet and voluntarily bargain an agreement setting employee terms and conditions of employment. 29 U.S.C. § 151. The regulation of employer misconduct by means of the unfair labor practice provisions of Section 8(a) (29 U.S.C. § 158(a)) is but a means to that end. In recognition of that fact, Congress not only carefully chose what conduct would be proscribed, but also what sanctions would and would not be applied to remedy misconduct. Thus, Congress understood human nature and apparently believed that the imposition of certain remedies (including, most particularly, punitive remedies) would be contrary to its goal of voluntary and cooperative collective bargaining.

This Court has clearly recognized that Congressional judgment. In *Lockridge*, *supra*, 403 U.S. at 287, the Court stated:

> [T]he range and nature of those remedies that are *and are not available* is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. [Emphasis added.]

In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 (1975), the Court said:

> The Court has held repeatedly that federal law preempts state remedies that interfere with federal labor policy or with specific provisions of the NLRA. . . . The use of state antitrust law to regulate union activities in aid of organization must also be preempted because it creates a substantial risk of conflict with policies central to federal labor laws.
>
> . . . If [state antitrust laws] take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies . . . and interfere with the detailed system Congress has created. . . . [Citations and footnotes omitted.]

And in *Automobile Workers v. Russell, supra*, 356 U.S. at 650, the dissent, which apparently now represents the views of the Court in cases involving other than violent activity (see *Lockridge, supra*, 403 U.S. at 297 n.7), stated:

> The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset the balance as effectively as by frustrating or duplicating existing ones.

Accordingly, Wisconsin's imposition of an additional sanction for NLRA violations—be it a "me too" sanction based on an NLRB adjudication or a sanction imposed after independent adjudication [4]—is in direct substantive

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[4] The State has contended that its debarment statutes should not be preempted because the State does not and will not adjudicate whether an employer's actions violate or are permissible under the NLRA. Accordingly, says the State, there is no chance of conflict

conflict with the NLRA. And that conflict is heightened by the fact that, as we show below, Wisconsin's debarment remedy is not only punitive, rather than simply remedial, but is also a remedy Congress has specifically considered and rejected.

This Court has recognized that the National Labor Relations Act creates a national labor policy that is remedial rather than punitive. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Edison v. Labor Board*, 305 U.S. 197, 235-236 (1939). As noted above, there are sound reasons for this Congressional judgment—i.e., that a thoroughly punished employer may be less likely to engage in voluntary and cooperative collective bargaining than an employer who has been required only to make whole those injured by his misconduct.[5]

The debarment statutes at issue here obviously impose a penalty in direct conflict with Congress' policy judg-

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with the NLRB's administration of the Act. But the State reads the NLRA and this Court's preemption decisions too narrowly. Although labor preemption is obviously concerned with the possibility of inconsistent state adjudication regarding the permissibility of conduct, that is not its only concern. On the contrary, as shown above, Congress was every bit as concerned about the remedies to be imposed and those to be withheld for NLRA violations.

[5] Congress may also have judged that the possibility of substantial penalties, unlike simple remedial provisions, might well make some protected activity too risky to undertake. *Automobile Workers v. Russell, supra*, 356 U.S. at 652-653 (dissent). For example, an employer whose business consists entirely of sales to the State of Wisconsin might well hesitate to lock out its employees—an activity with which a state may not interfere (*Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976))—since virtually any action taken with respect to employees creates some risk of an unfair labor practice finding. Although the employer might correctly consider the lockout entirely lawful and thus be willing to run the slight risk of being wrong and incurring backpay liability, the possibility of being put out of business would change the risk equation and might convince the employer to forego this protected activity.

ment embodied in the NLRA. Wisconsin has imposed a sanction (debarment) that has no relationship with the nature of an employer's unfair labor practices, that is not designed to cure the effects of the unlawful activity, and that is merely an *in terrorem* device to punish employers for unfair labor practices that have already been remedied by the NLRB's processes.[6] As made clear by the 1977 Congressional debates surrounding the consideration and rejection of debarment as a remedy for NLRA violations, debarment is not only a penalty, it is a drastic penalty clearly repugnant to the scheme of the NLRA:

> This new punitive sanction is akin to killing a fly with a sledgehammer. The sole purpose of this provision is to punish the employer rather than to remedy a violation of the law.

H 10637 Cong. Rec. (October 5, 1977).

> The debarment remedy transforms the National Labor Relations Act from a remedial statute into a severely punitive one—a transformation which turns the 42-year-old purpose of the act on its head.

H 10673 Cong. Rec. (October 5, 1977)

In sum, the remedial scheme established by the NLRA represents a delicate balance. Congress saw fit to *cure* unfair labor practices in order to put employees in a position to exert their collective bargaining strength. However, it did not permit punitive sanctions which might make the parties less likely to approach the bargaining table with a cooperative spirit. By adding but a simple remedy for NLRA violations, the State would have inter-

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[6] It does not aid Wisconsin's cause to suggest, as it does, that a different conclusion is required because the State is not providing a remedy *to employees* for NLRA violations. That fact just establishes that the State-imposed sanction is punitive rather than remedial.

fered with that statutory scheme. By adding the "sledgehammer" penalty of debarment, the State has even more clearly interfered with the Act, especially in view of Congress' express rejection of that penalty in 1977. Accordingly, the State's debarment statutes must be preempted by the NLRA.

Aside from the punitive nature of Wisconsin's sanctions, the State's statutes impinge on the policies of the Act in a second major way—they represent a significant threat to the uniform, single, nationwide system of labor regulation that Congress sought.[7] This Court has long recognized that one of the driving forces behind the enactment of the NLRA "was the perceived incapacity of common-law courts and state legislatures . . . to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces. . . ." *Lockridge, supra*, 403 U.S. at 286. Accordingly, in enacting the NLRA Congress acted comprehensively in order to "obtain uniform application of its substantive

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[7] There is yet a third way the statutes interfere with the NLRA —and this one is unrelated to the specific sanctions imposed. By applying the statutes only to court-enforced unfair labor practice findings, Wisconsin interferes with employers' right to seek judicial review of NLRB determinations. Although the Court of Appeals below rejected that concern on the ground that the imposition of harsher sanctions following appeal is not unusual "in our system of law" (750 F.2d at 614), the appellate court missed the point. The question is not whether, as a constitutional matter, stiffer penalties may be imposed after appeal. Rather, the question is whether a state may burden an appeal right provided in a federal statute, and particularly the NLRA. Here Congress obviously made the opportunity for judicial review an integral part of the federal statutory scheme, since it declined to make NLRB orders self-enforcing and gave aggrieved parties the right to petition federal courts for review of Board orders. 29 U.S.C. §§ 160(e) and 160(f). Just as obviously, that system is frustrated by a state debarment statute which is applied only when an employer has exercised its appeal rights contained in the Act.

rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Garner v. Teamsters Union, supra*, 346 U.S. at 490. It is the recognition of these fundamental premises that underlies this Court's preemption decisions. *E.g., Garmon, supra*, 359 U.S. at 241-243.

Wisconsin's statutes violate these uniformity principles in two ways. First, as we have just discussed, the statutes impose an additional sanction not available under the NLRA, thus upsetting the uniformity between federal labor remedies generally and the remedies which are imposed on employers doing business with the State of Wisconsin. Second, permitting the Wisconsin statutes to stand would create a real potential for what could amount to different labor remedies in each of the 50 states.[8] For example, Wisconsin may debar multi-violators for three years; New Jersey may do the same for 10 years; and Indiana may choose not to debar anyone. New Hampshire may debar for one year only employers who discharge employees in violation of Section 8(a)(3) of the Act; Oregon may debar for seven years all who violate their Section 8(a)(5) duty to bargain in good faith, while neighboring Washington may debar all 8(a)(5) violators except those who engage in only a technical violation in order to gain court review of NLRB election case decisions. Ohio may decide that any employer who is found to have dominated a union in violation of Section 8(a)(2) shall never do business with that State. Iowa may decide that it will refuse to do business with any employer whose employees are represented by a union that has twice violated the NLRA in the prior two years; and North Carolina may decide to purchase only from

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[8] The National Governors' Association has already identified four other states which have enacted debarment statutes which blacklist employers that have been found guilty of varying numbers of NLRA violations (National Governors' Association Brief at 2 n.1).

NLRA violators whose manufacturing facilities in that State are threatened because the companies have been debarred in so many other states.

Nor will debarment necessarily be limited to those who violate the NLRA. New York City may debar all employers with no collective bargaining agreements; the village of Mount Airy, Pennsylvania may debar struck employers; Dade County, Florida may debar any employer who lawfully locks out its employees, etc., etc.

The possibilities and permutations are endless because every government in the land buys goods and services. But the point is clear. If state and local governments may penalize those with whom they do business because the latter pursue a disfavored labor policy, there is little reason to believe that many years will pass before the single, consistent, nationwide remedial scheme of the NLRA will become a thousand different, varied and conflicting remedial schemes.[9]

In summary, the Wisconsin statutes now before the Court are preempted by the National Labor Relations Act. These statutes are specifically directed at the labor relations activities of private employers which are cov-

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[9] The Court recognized the impermissibility of such a result in *Lockridge, supra* (403 U.S. at 288 n.5);

> [The dissent] apparently regards the remedial aspects of the federal scheme as unimportant to those who designed it. For example, assuming *arguendo* that petitioner's conduct was prohibited under both federal and state law, [the dissent] would deem it of no national significance if one State punished such conduct with a jail sentence, and another utilized punitive damages, while the NLRB merely awarded back pay. His position apparently is that Congress considered any state tribunal equally capable, with the Board, of assessing the appropriateness of a given remedy and was unconcerned about the disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

ered by the Act, they do not promote any legitimate non-labor interests of the State, and they intrude seriously and substantially in numerous ways on the federal scheme of labor-management relations created by Congress in 1935. Indeed, but for the "market participant" twist, it is doubtful that this Court would have found the case worthy of review. We turn now to that issue and show why it should have no effect on the outcome dictated by traditional preemption principles.

B. The Wisconsin Statutes Are Not Saved From Federal Preemption By The Fact That The State Allegedly Acted As A "Market Participant" Rather Than As A Direct Regulator Of Labor Relations Conduct

Wisconsin argues here that its decision not to do business with companies that violate the NLRA cannot be preempted because the State is acting as a "market participant" and not as a direct regulator of labor relations conduct. The essence of the State's argument is that General Motors may refuse to do business with labor law violators, so why can't the sovereign state Wisconsin? The simple answer is that Wisconsin is a state which, despite its independent sovereignty, is subject to the United States Constitution, whereas GM is not.[10] Although that answer appears on its face to beg the question, we demonstrate below why it is the right answer.

Wisconsin's theory that its actions as a market participant are immune from preemption emanates from a series of decisions in which this Court has considered whether the "dormant Commerce Clause"—i.e., the implied proscription of state trade barriers when Congress has been silent on the subject—prohibits state and municipal governments from favoring their own citizens in the

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[10] The entire point of the preemption doctrine is that state and local government action inconsistent with the acts of Congress is foreclosed by the Supremacy Clause of the Constitution. Private employer action, however, is not subject to the Supremacy Clause.

governments' own market transactions.[11] In those cases the Court concluded that "[n]othing in the purposes animating the Commerce Clause forbids a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." *Alexandria Scrap*, 426 U.S. at 810 (emphasis added; footnotes omitted). Thus, these cases have come to "stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White*, 460 U.S. at 208.

This conclusion, however, cannot be divorced from the analytical framework that produced it. Of particular relevance here is the fact that the Court's consideration of these questions was "counseled by considerations of state sovereignty . . . and the 'long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Reeves*, 447 U.S. at 438-439, *quoting United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (footnotes omitted). Nevertheless, and of critical significance here, this recognition of the state's sovereignty and of the rights of private free traders did not end this Court's inquiry. Rather, the Court found it necessary to examine the purpose and history of the Commerce Clause to determine whether that constitutional provision prevented sovereign governments from exercising rights normally available to free traders to deal with whomever they choose.

In the above-cited cases the Court found that when a state acts as a simple market participant, rather than as

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[11] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (*"Alexandria Scrap"*); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (*"Reeves"*); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (*"White"*); *South-Central Timber Development, Inc. v. Wunnicke*, —— U.S. ——, 81 L. Ed. 2d 71 (1984).

a market regulator, its actions do not violate the Commerce Clause—but only the Commerce Clause. The reason, of course, is that the distinction between "market participation" and "market regulation" by a state is relevant to the evils the Commerce Clause was designed to prevent. For example, in its first decision on the question, *Alexandria Scrap*, this Court engaged in a detailed review of the purposes and past application of that constitutional provision. It started with the basic premise underlying the Commerce Clause: "that this Nation is a common market in which state lines cannot be made barriers to the free flow of . . . goods in response to the economic laws of supply and demand." 426 U.S. at 803. Thus, the Commerce Clause "was designed in part to prevent trade barriers" (*id.* at 807), and the "common thread" in the Court's decisions finding violations of the Clause was the fact that "the State interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Id.* at 806 (emphasis added). The Court distinguished the case before it, however (*id.*):

> By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered the market itself to bid up the price.

In short, *Alexandria Scrap* and its progeny merely establish that, in the absence of Congressional action, the Commerce Clause proscribes only state action which erects an artificial, regulatory barrier to interstate commerce which, in turn, interrupts natural market supply and demand. It logically follows that a state does not transgress these Commerce Clause bounds by direct participation as a buyer or seller in the market—i.e., by, in effect, becoming part of the natural supply and demand in the market.

What is true with respect to the Commerce Clause, however, is not necessarily true with respect to other

constitutional provisions that the actions of a state may violate—a fact which Wisconsin and its *amici* virtually ignore. For example, no one would seriously contend that a state's decision to contract only with white-owned businesses is immune from scrutiny under the Equal Protection Clause merely because the state is acting as a market participant and asserts the same right as other free traders to choose its trading partners. Similarly, a state's debarment of contractors who refuse to waive immunity from prosecution and refuse to testify is not free of scrutiny under the Due Process Clause even though debarment can be characterized as a "market participant" decision in which the state is exercising its sovereign right to choose its trading partners. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973). Finally by way of example, this point is perhaps best illustrated by this Court's decision in *United Building and Construction Trades Council v. Mayor and Council of Camden*, —— U.S. ——, 79 L. Ed. 2d 249 (1984), where the Court considered a Privileges and Immunities Clause challenge to a city ordinance establishing a hiring preference for city residents on city construction projects. The Court distinguished the *Camden* case from its earlier decision in *White, supra*, where it had upheld a similar Boston executive order under Commerce Clause challenge (79 L. Ed. 2d at 259-260):

> Our decision in White turned on a distinction between the city acting as a market participant and the city acting as a market regulator. . . . But the distinction between market participant and market regulator relied upon in White to dispose of the Commerce Clause challenge is not dispositive in this context. The two Clauses have different aims and set different standards for state conduct.
>
> . . . [T]he fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.

For present purposes, then, the critical question is *not* whether the Commerce Clause reaches state action as a market participant when Congress has not spoken, *but rather*, whether the Supremacy Clause reaches such activity when Congress has comprehensively legislated as it has in the NLRA. We submit that it does.

The Supremacy Clause of the Constitution (Art. VI, Cl. 2) directs that the acts of Congress shall be supreme over those of the states. As such, it forms the constitutional basis for the labor preemption doctrine that prohibits states from enforcing laws that will interfere with or frustrate the federal scheme of labor-management relations embodied in the NLRA.

Unlike the Commerce Clause with its "animating purpose" to remove artificial trade barriers, nothing in or animating the Supremacy Clause suggests that there is any operative distinction between state action as a market participant and its action as a regulator of conduct. Indeed, logic dictates that the comprehensive acts of Congress, in this case the NLRA, can be interfered with and frustrated just as easily by a state acting as a market participant as by a state acting as a regulator of conduct. For example, if state actions are immunized from Supremacy Clause challenges merely because the state is acting as a "market participant" and exercising its "free trader" right to choose with whom to deal, then there is no reason why a state cannot take the following actions despite the existence of the NLRA:

—debar any employer that has a collective bargaining relationship with a union that has violated the NLRA;

—debar any employer whose employees engage in a strike;

—debar any employer whose employees have filed an unfair labor practice charge;

—debar any employer that has engaged in a lawful lockout;

—debar any employer that has been picketed during the preceding year;

—debar any employer whose employees concertedly refuse to work overtime; etc.

Each of these actions interferes with rights and obligations that are either specifically covered by the NLRA or that, under the Act, are designed to be free from governmental intervention. *See Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n, supra.* Why, then, for Supremacy Clause purposes, should it make any difference whether the state's interference is through market participation or through regulation?

In short, the purposes and policies of the National Labor Relations Act are just as easily frustrated through market participation as through direct regulation of conduct. Accordingly, given the purposes animating the Supremacy Clause—i.e., that the acts of Congress shall preclude inconsistent state action—a state's actions, whether as "market participant" or "regulator of conduct," should be subject to scrutiny under the same labor preemption standards.[12]

Even if that were not the case, however, the Wisconsin debarment statutes here in issue would still be preempted. As we show below, those statutes embody the regulation of conduct rather than merely the permissible decisions of a market participant.

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[12] *Cf. New York Telephone Co. v. New York Department of Labor*, 440 U.S. 519 (1979) (New York law providing payment of unemployment compensation to strikers scrutinized for interference with purposes and policies of NLRA, but ultimately held permissible because of legislative history indicating Congress intended the states to have this freedom); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967) (Supremacy Clause violated by interpretation of state's unemployment compensation law that would render persons filing NLRB charges ineligible for unemployment compensation).

In the cases in which the market participant exception has been deemed dispositive of Commerce Clause claims, the state and local governments had based their market decisions on where their potential trading partners lived or worked, not on their conduct. Thus, the governments' actions could not constitute regulation of conduct, since the conduct of the potential traders could not affect the governments' decision whether to deal.[13]

Where a state has gone further, however, and imposed conditions regulating the conduct of its potential trading partners, the state's actions have properly been found to be regulatory in nature and subject to the prohibitions of the Commerce Clause. As the plurality stated in *South-Central Timber Development, Inc. v. Wunnicke*, *supra*, 81 L. Ed. 2d at 83:

> Contrary to the State's contention, the [market participant] doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity. . . .
>
> . . . [A]lthough the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant.

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[13] This was precisely the distinction recognized by the Court in *White*, a case in which the Mayor of Boston was alleged to have violated the Commerce Clause by adopting an executive order requiring that all city-funded construction projects be performed by a workforce consisting of at least 50 percent Boston residents. The dissent argued that the mayor's action went beyond market participation because it regulated employment contracts between public contractors and their employees (460 U.S. at 211 n.7, 217, 220). Although recognizing that there are limits on a state's ability to impose conditions, the majority rejected the dissent's argument because "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.* at 211 n.7.

This same rationale can be applied with equal force in the instant case. Wisconsin has used its buying power as leverage to exert a regulatory effect on the conduct of employers—i.e., their compliance with the NLRA. This conclusion flows not only from Wisconsin's admission that the purpose of the statutes is to discourage labor law violations by employers (576 F. Supp. at 1297), but from the nature of the statutes themselves.

First, there can be no doubt that the availability of debarment from government contracting is a potent means of regulating conduct.[14] Indeed, those employers whose business dealings are mainly with governments (road builders, manufacturers of traffic lights, printers and publishers of secondary school books, etc.) are threatened with extinction by a debarment penalty. Further, one searches the Wisconsin statutes in vain for any purpose to be served by the statutes *other than* the regulation of labor relations conduct. Certainly there is no purpose related to normal market participation decisions or even to a desire to further the economic well-being of Wisconsin's citizenry. In particular, Wisconsin's decision not to purchase from an NLRA violator has nothing to do with the price or quality of the goods being offered for sale. Indeed, there is no connection whatsoever between the seller's NLRA violations and the goods being purchased.[15] . Moreover, the statutes confer no benefit

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[14] Congress itself has recognized the potency of the debarment remedy in regulating conduct. *See, e.g.*, the Walsh-Healey Act, 41 U.S.C. § 37; the Service Contract Act, 41 U.S.C. § 354; the Davis-Bacon Act, 40 U.S.C. § 276a-2. As pointed out previously, however, Congress specifically determined that debarment should not be applied to remedy Labor Act violations, in part because it was too potent a penalty.

[15] In this case, for example, the Gould division which would have lost its State contracts had not committed any unfair labor practices. Further, Gould had remedied all its unfair labor practices, and had sold the component parts of its business in which those unfair labor practices had been committed, before it was debarred from

upon local industry and offer no jobs or employment protection to Wisconsin's citizens.[16] Finally, whatever may be said regarding the statutes' regulatory nature as applied to state contractors who have themselves violated the NLRA, the statutes are clearly regulatory as applied to state contractors who merely do business with labor law violators. Since Wisconsin notifies its potential vendors that the State will not buy their products which contain components produced by identified labor law violators, the State is regulating the conduct of those vendors by forcing them to cease doing business with the blacklisted employers in order to maintain their contracts with the State.

In sum, Wisconsin's debarment statutes under attack in this case had but one purpose and effect—the regulation of labor relations conduct of all employers in this country who might ever seek to do business with the State. In enacting these provisions Wisconsin may well have been motivated by its "deeply rooted interest in compliance with the labor laws" (750 F.2d at 611) and by its judgment that the remedies under the National Labor Relations Act simply are not sufficiently stringent to effectively punish violators of that federal statute. However, this Court's preemption decisions squarely foreclose the State from acting on these beliefs and judgments, because Congress has imposed *its* beliefs and judgments on what this nation's labor policies should be. Accordingly, Wisconsin's debarment statutes cannot stand.

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selling goods to the State of Wisconsin. Accordingly, the goods being offered to Wisconsin could not have been "tainted" by Gould's unlawful conduct.

[16] In this case, all of Gould's unfair labor practices were committed against citizens and residents of states other than Wisconsin.

CONCLUSION

For the foregoing reasons, the Chamber respectfully submits that the judgment of the Seventh Circuit should be affirmed on the ground that the Wisconsin statutes violate the Supremacy Clause.

Respectfully submitted,

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Dated: September 10, 1985

Supreme Court, U.S.
FILED
SEP 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1484

In the Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL., APPELLANTS

v.

GOULD INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING APPELLEE

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QUESTION PRESENTED

Whether the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempts a state statute debarring employers from doing business with the State if they have been found by courts of appeals to have violated the Act three times within five years.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1484

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL., APPELLANTS

v.

GOULD INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented in this case is whether the National Labor Relations Act preempts a state law debarring an employer who has violated the Act from doing business with the State. Relying on *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny, the court of appeals held that the state statute is preempted by the Act and therefore invalid under the Supremacy Clause because it impermissibly supplements the remedial scheme established by Congress in the Act. Formulating and implementing appropriate remedies for violations of the Act are central to the mission of the National Labor Relations Board. The Board accordingly has a significant interest in the proper application to this case of the preemption doctrine, which is

designed to preclude interference with the uniform administration of federal law by conflicting state rules and remedies.

STATEMENT

1. The State of Wisconsin provides by statute that persons or firms that have been found by orders of the National Labor Relations Board enforced by courts of appeals to have violated the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, in three separate cases within a five-year period shall be placed on a list of labor law violators for three years. Wis. Stat. Ann. § 101.245 (West Supp. 1984-1985). Persons or firms found in contempt of court for "failure to correct" three separate violations of the Act within five years must also be placed on the list. *Ibid.* The State "shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators." *Id.* § 16.75(8).

In 1982, the State placed appellee Gould Inc. on the list of violators and announced that two contracts between Gould and the State would be cancelled as soon as practicable and that the firm would not be awarded any new state contracts until 1985. The State also notified all of its current and potential vendors that they could not sell to the State any product that contained components produced by Gould. Gould, a Delaware corporation with its principal place of business in Illinois, was placed on the list because of the enforcement of four Board orders against various divisions of the company, none of which were located in Wisconsin. Gould no longer owned any of these divisions at the time that it was placed on the list. J.S. App. 6-7, 50-53.

2. Gould filed this action in the United States District Court for the Western District of Wisconsin,

seeking injunctive and declaratory relief with respect to the State's enforcement of its debarment statute on the ground that the state law was preempted by the NLRA and therefore invalid under the Supremacy Clause.[1] On cross-motions for summary judgment, the district court ruled that the Wisconsin statute is preempted and permanently enjoined the State (through its officials) from enforcing it against Gould (J.S. App. 45-83).[2]

The district court reasoned (J.S. App. 56-66) that whether the Wisconsin debarment statute is preempted depends on a balancing of relevant state and federal interests. The court rejected (*id.* at 66-74 & n.7) the State's assertions that its proprietary purchasing function was furthered by the statute and that it was acting purely as a market participant (*id.* at 72-73 (emphasis deleted)):

> [The statute] is directed specifically towards effecting [*sic*] the labor relations of those employers who are adjudicated federal labor law violators. Defendants have not suggested that §§ 101.245 and 16.75(8) have any legitimate nonlabor purpose * * *.

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[1] Gould also argued that the statute violated its rights to due process and equal protection under the Fourteenth Amendment by burdening its right to seek judicial review of Board orders. The district court did not reach this claim (J.S. App. 82 n.11), but it did conclude that the argument was sufficiently substantial to justify an award of attorney's fees under 42 U.S.C. 1988 (see J.S. App. 8).

[2] The district court dismissed three state agency defendants under the Eleventh Amendment; the action proceeded against four state officials under *Ex parte Young*, 209 U.S. 123 (1908) (J.S. App. 53-55). Gould apparently abandoned any claim for damages (*id.* at 55 n.3).

> It may be that the exercise of [the State's] proprietary function is deeply rooted in tradition. However, in this instance, the exercise of that function has the wholly illegitimate purpose of discouraging federal labor law violations by employers.

Indeed, the district court noted (*id.* at 73 (emphasis and citation omitted; brackets in original)) that the State had conceded that it was " 'merely seeking to influence private conduct already prescribed [sic] by federal labor policy.' " The "minimal" (*id.* at 74 (emphasis omitted)) legitimate state concerns were, in the district court's view, outweighed by significant federal interests, such as the policy of uniform federal remedies, that were impinged by the law (*id.* at 74-82), and therefore the debarment statute was preempted by the NLRA.

3. The court of appeals affirmed the district court's invalidation of the Wisconsin statute (J.S. App. 1-44).[3] Relying on *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny, the court of appeals concluded (J.S. App. 8-21) that the statute was preempted because it impermissibly supplemented the remedial scheme established by Congress and the Board under the NLRA. Although the debarment statute reflected the "laudable purpose" (*id.* at 14) of promoting compliance with the NLRA, the State's decision to "bas[e] a boycott on federal labor law violations, regardless of where the violations occurred and whether they have been rectified, clearly interfere[d]," in the court of appeals' view (*id.* at

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[3] The court of appeals reversed the district court's award of attorney's fees to Gould under 42 U.S.C. 1988 (J.S. App. 38-44). Gould did not cross-appeal from this portion of the judgment, and it is therefore not before the Court. See, *e.g.*, *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 64 n.5 (1983).

15), with the federal regulatory scheme. Wisconsin's "impos[ition] [of] a much harsher sanction than Congress intended" (*id.* at 26-27) for federal labor law violations, along with the possibility of other states adopting debarment statutes of varying scope and operation (*id.* at 21), demonstrated that "[a]llowing the states indiscriminate punishment of recidivism impermissibly intrudes on the federal scheme of regulation" (*id.* at 20 n.7).

The court of appeals rejected the State's argument that it was legitimately furthering local policy as a market participant, not regulating conduct within the purview of the NLRA. Because "the policy the [state] law promotes is not efficient use of state funds but the intent to effect compliance with the NLRA" (J.S. App. 31), the court of appeals concluded that Wisconsin "simply is not functioning as a private purchaser of services" (*id.* at 30), but rather is "actually regulat[ing] employers' conduct" (*id.* at 27 (footnote omitted)). Even if Wisconsin were acting as a market participant, the court of appeals distinguished cases holding that such conduct does not run afoul of the "dormant" Commerce Clause, because here "Congress has legislated decisively in the area" (*id.* at 22).

INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been settled that states may not provide their own remedies for conduct that violates the National Labor Relations Act. See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485 (1953). As the Court explained in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 287 (1971), such state remedies must be preempted because the "nature of those remedies that are and are not avail-

able is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act." State sanctions for unfair labor practices encroach on the Board's responsibility to develop and apply a unified remedial scheme that effectuates the policies of the Act.

Wisconsin's debarment law was intended as a penality against violators of the federal Act in order to deter future unfair labor practices. Moreover, the state law clearly operates as such a penalty by preventing employers from competing for the State's business. This conclusion is reinforced by the substantial purchasing power of the State: it blinks reality to suggest that the objects of the State's boycott are not economically harmed because they may take their business elsewhere.

The conduct at which the Wisconsin statute is directed—actual unfair labor practices—is plainly within the core of Congress's concerns in the NLRA. State penalties for such conduct are improper not only because they are uninvited additions to what Congress envisioned as a scheme developed and implemented by a single expert agency but also because they are substantially at odds with the remedial scheme devised by Congress. Under that scheme, the Board cannot impose flat penalties, but rather is empowered to remedy unfair labor practices by restoring the status quo ante and prohibiting the commission of similar practices in the future. The Board's remedies are designed to effectuate Congress's purpose to restore (insofar as possible) the flow of commerce once a violation has been remedied; Wisconsin's law stands as an obstacle to achieving that statutory purpose.[4]

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[4] Indeed, an unfair labor practice adjudication is not necessarily an indication of bad faith on the part of an employer; it can often result from a good-faith effort to test the

Significantly, Congress has refused to enact a federal contract debarment scheme, even one carefully tailored, as Wisconsin's is not, to effectuate the purposes of the NLRA.

The Wisconsin statute is not directed solely at matters of deep local concern: to the contrary, it applies to unfair labor practices anywhere in the country. None of Gould's violations, for example, took place in Wisconsin. There is therefore no warrant for excepting the debarment statute from the usual operation of the preemption doctrine. In any event, this exception from the normal presumption of preemption was crafted by the Court for a limited number of traditional local concerns such as public safety and common law rights. It was never intended to be available for invocation in the wholly conclusory fashion proposed by the State in this case. Indeed, whenever Wisconsin has undertaken to explain what its "deep local concern" might be, it has inevitably spoken of a concern to affect labor relations, and that of course it may not seek to do. That is precisely the subject of concern as to which the federal statutory scheme is self-contained and exclusive.

The State seeks to avoid preemption by urging that it is acting merely as a "market participant" as that term is used in "dormant" Commerce Clause cases where Congress has not legislated. The very triggering mechanism of the state law, however, shows that Wisconsin is not acting as a market participant seeking to advance local economic concerns, but rather as a regulator punishing conduct proscribed by federal law. Moreover, even if the State's statute could be

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scope of rights where this is unclear under the Act. Moreover, under the structure of the Act, it is the only means whereby employers can challenge Board certification decisions, such as bargaining unit determinations.

regarded solely as market participation, the cases on which the State relies are inapposite, because here Congress has legislated with preemptive effect. The market participation doctrine is applicable to dormant Commerce Clause cases only; it has never been invoked in the myriad situations where state laws may conflict with some actual exercise of congressional power —such as designating an article of commerce as contraband which neither the states nor other market participants may lawfully sell or purchase. It is only in the dormant Commerce Clause cases that Congress has not used its constitutional powers to define any national policy and so a state, like any other "market participant," may participate on whatever terms it chooses.

Here, however, Congress has expressed a comprehensive and detailed policy on the subject matter of labor relations and it is the elementary meaning of the Supremacy Clause that all levels of government are bound by that policy. Of course private parties need not share that policy; they may have quite different labor policies, whatever it may mean for a private party to have a "policy" at all. But then private parties, unlike the states, are not bound by the Supremacy Clause, but only by the actual provisions of the law itself.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT PREEMPTS WISCONSIN'S STATUTORY DEBARMENT FROM STATE CONTRACTS OF EMPLOYERS THAT HAVE VIOLATED THE ACT

The State of Wisconsin has acted to penalize employers that have violated the federal labor law, in the hope of deterring future unfair labor practices. The goal is commendable. Yet Congress intended that remedies for violations of the NLRA be developed

and administered by a centralized expert agency, the National Labor Relations Board. Only in this way can its purpose of promoting the flow of commerce and thus benefiting employers and employees alike be achieved. For this reason, the Court has long recognized that state attempts to supplement the remedies for unfair labor practices applied by the Board are preempted by the Act. While the state-imposed penalty here may be a novel one, its purpose and effect are clear, as are the principles that apply. Wisconsin's debarment statute is preempted by the NLRA and is therefore invalid under the Supremacy Clause.

A. States May Not Provide Their Own Sanctions For Conduct That Violates The Act

A repeated theme of the Court's labor law preemption decisions has been that a state may not provide its own remedies for conduct that actually or arguably constitutes an unfair labor practice under the NLRA.[5] More than 30 years ago, the Court, in holding a state remedy preempted, observed that "when two separate remedies are brought to bear on the same activity, a conflict is imminent." *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 498-499 (1953). In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the seminal labor preemption decision, the Court was "concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, *remedy*, and administration" (*id* at 243 (emphasis added)). Where

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[5] The Court's holdings have, of course, been grounded on Congress's intent as expressed in the NLRA: "as in any preemption analysis, [t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co.* v. *Massachusetts*, No. 84-325 (June 3, 1985), slip op. 22 (citation and quotation marks omitted; brackets in original).

an employer's conduct actually violates the Act, "then the matter is at an end, and the States are ousted of all jurisdiction" (*id.* at 245). State remedies that supplement the NLRB's are preempted just as surely as those that could be provided by the Board (*id.* at 247):

> [S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

The Court amplified on this reasoning in reaffirming *Garmon* in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). The Court stated first that preemption is not designed "merely to avoid disparity in the content of proscriptive behavioral rules" (*id* at 287). Because "simple congruity of legal rules does not, in this area, prove the absence of untenable conflict" (*id.* at 290), the "potential for debilitating conflict" (*id.* at 289) is present even when a state applies the same rules as the NLRB does. Remedies provided by states for conduct that violates the NLRA conflict with Congress's purpose of "committ[ing] enforcement of the [Act] * * * to a centralized [federal] agency" (*id.* at 288-289 n.5). Preemption of state remedies is founded on the fact that the "nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act" (*id.* at 287). See also, *e.g.*, *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 684 (1983) (claim that additional state remedies are not preempted "was squarely rejected" in *Garmon*); *Farmer* v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 305-307 (1977) (damages cannot be awarded

for aspect of tortious conduct that would constitute an unfair labor practice).

The reason for concern with state remedies for conduct that violates the NLRA is plain: Congress has committed to the Board "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc.* v. *NLRB*, No. 82-945 (June 25, 1984), slip op. 14; see, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941) (Congress has "entrust[ed] to an expert agency the maintenance and promotion of industrial peace"). Developing and applying remedies to eliminate the "industrial strife" that has caused "obstructions to the free flow of commerce" (§ 1, 29 U.S.C. 151) is "peculiarly a matter for administrative competence" (*Phelps Dodge Corp.*, 313 U.S. at 194). Accordingly, the Board's remedies are "subject to [only] limited judicial review" (*Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)). Only a unified system of remedies applied by the Board can "give coordinated effect to the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

The Board is, as the Court stated in *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 145 (1971) (footnote omitted; emphasis added), "the *sole* protector of the 'national interest' defined with particularity in the Act." Laws such as Wisconsin's are at odds with the congressional judgment that the Board alone has the expertise to determine what measures to take in response to unfair labor practices and that the policies of the Act are best effectuated by avoiding a diversity of local procedures for dealing with such conduct. Thus, even were it not the case that, as we show below (pages 16-18), Wisconsin's law is inconsistent with the essentially remedial nature of the

scheme that the Board administers, the State's effort to implement its own local "anti-recidivist" policy frustrates the intent of Congress. The problem is, of course, compounded by the prospect of other states enacting their own variations on Wisconsin's law (see note 8, *infra*), thereby creating a pastiche of state penalties imposed on top of the Board's remedial scheme. See *Lockridge*, 403 U.S. at 286 (footnote omitted) (a primary factor in "the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency * * * was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good").

B. Wisconsin's Statutory Boycott Of Federal Labor Law Violators Was Intended To Be And Operates As A Penalty For Unfair Labor Practices

1. The Wisconsin debarment statute penalizes a class of persons defined solely in terms of their commission of unfair labor practices proscribed by the NLRA. The State candidly admitted in the district court that its law is intended to deter violations of the federal statute (J.S. App. 73 (emphasis and brackets in original), quoting Defendants' Br. 12, 18):

> "The state has a deeply rooted policy of discouraging labor law violations, and the State, as a market participator in the purchase of goods and products, can so restrict its purchasers so as *not to promote labor law violators* as an exception to NLRA preemption . . . Wisconsin is not engaging in direct state regulation of private labor conduct, but is merely seeking to *influence*

> *private conduct* already prescribed [sic] by federal labor policy."

Similarly, the State argued in the court of appeals that "Wisconsin has a deeply rooted interest in compliance with the labor laws" (J.S. App. 14; see *id.* at 31). Thus, the policy behind the debarment statute could not be plainer: the State is attempting to influence the conduct of employers to prevent future violations of the NLRA by penalizing those who have violated the Act in the past.[6]

The State is, as it admits (J.S. 19), acting out of "a policy disgust" at dealing with unfair labor recidivists. By contrast, it does not argue that its debarment statute is intended to further some legitimate economic interest of the State. For example, the statute has not been justified by a concern for product quality or uninterrupted supply. Indeed, Wisconsin admits (Br. 30) that debarment is costly to the State and results in "economic inefficiency." It is, moreover, self-evident that the debarment policy can make a difference only when the State's normal procurement criteria would otherwise cause it to deal with the debarred company. Thus, the policy behind the statute is related solely to the State's interest in punishing federal labor law violators and not to any economic self-interest that would benefit an ordinary participant in the market.

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[6] Before this Court, the State ignores its previous representations and suggests (Br. 30-31, 45) that its debarment statute was intended merely to further the State's interest in not giving its custom to employers that have committed unfair labor practices. Even crediting this change of heart, the structure and practical effect of the statute ultimately must be controlling. See, *e.g.*, *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951).

The practical effect of the statute also is plain: it operates to penalize employers and their employees by barring them from competing for the State's business. Gould faces the loss of $250,000 worth of business with Wisconsin (J.A. 17, 20). Moreover, Wisconsin's debarment sanction extends beyond the immediate employer that has violated the NLRA. Pursuant to the statute, the State has refused to purchase from *any* supplier products that contain *components* produced by employers on the list of violators (J.S. App. 52-53), thus spreading the disruptive effect of the penalty throughout the economy and increasing the likelihood that the debarment statute will in fact influence the conduct of employers, as it was intended to do.

The State of Wisconsin spent almost $7 billion in 1981 alone.[7] While the economic effect on any particular firm would vary according to such factors as its size and the percentage of its business attributable to the State, a boycott by a consumer of this magnitude cannot help but be significant in a large number of cases. The State certainly must have thought this to be true; otherwise, the debarment statute could not have its intended effect of deterring violations of the NLRA. The suggestion of amici National Governors' Association et al. (NGA) that a boycott by Wisconsin "imposes no penalty" because labor law violators are free merely "to take their business elsewhere" (Br. 12; see Br. 21) is thus essentially fatuous.[8]

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[7] Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 289 (104th ed. 1984). This figure includes salaries of state employees and transfer payments, but it suffices to demonstrate the scale of the State's purchasing power.

[8] NGA notes (Am. Br. 2 n.1) that at least four other states have passed legislation similar to Wisconsin's. These five

2. The State argues (Br. 31-33) that because its debarment statute does not prescribe rules of conduct for private persons, it is not the sort of state regulation addressed by the Court's labor preemption cases. This argument is unavailing. In the first place, the cases make it clear that states may not establish their own remedies for violations, regardless of whether they have established their own standards of conduct or merely incorporated those set forth in the NLRA as interpreted by the Board (see pages 9-12, *supra*).[9]

Moreover, although the law at issue may be novel, its practical impact on employers and employees is sufficient to bring it within the principles already developed. The Court has cautioned against "elevat[ing] form over substance" in labor preemption cases. *Allis-Chalmers Corp* v. *Lueck*, No. 83-1748 (Apr. 16, 1985), slip op. 9.[10] Here, although the de-

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states combined spent more than $40 billion in 1981. Bureau of the Census, *supra*, at 289. The total amount spent by state and local governments in 1984 for the purchase of goods and services (not including employee compensation) was more than $190 billion. 65 Bureau of Economic Analysis, U.S. Dep't of Commerce, *No. 4, Survey of Current Business* 13 (1985). It is apparent that statutes such as Wisconsin's, especially if they are adopted by more and more states, can be expected to have quite a significant economic impact on employers and employees throughout the nation.

[9] Surely Wisconsin could not prohibit recidivist labor law violators from doing any business within the State. Such a law would be preempted as to business both with private parties and with the State itself. That Wisconsin's penalty has not swept so far, encompassing only the latter prohibition, cannot reasonably be thought enough to make it consistent with federal labor policy.

[10] Plainly, the mere form of state action cannot exempt it from the preemption doctrine. For example, a state statute granting a *preference* in state contract bidding to labor law recidivists would obviously be preempted, as it would tend to

barment statute is not in form identical to the more typical state penalty, such as damages or a fine, in substance it has the same effect: it imposes monetary costs on an employer that has violated the NLRA. Surely Congress did not intend to permit Wisconsin to impose a $250,000 fine on an employer that has been found to have committed three unfair labor practices. Nor should it be understood as having intended to allow the State instead to withdraw $250,000 worth of business on the same factual predicate.[11]

This conclusion is reinforced by the "essentially remedial" nature of the NLRA. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10 (1940); accord, *Local 60, United Bhd. of Carpenters* v. *NLRB*, 365 U.S. 651, 657-658 (1961). The Board for example, may not fine employers as a means of deterring violations of the Act (*Republic Steel Corp.*, 311 U.S. at 12):

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encourage labor law violations. Because Wisconsin's law debarring recidivists conflicts (albeit in a different way) with the achievement of federal labor policy, it too is preempted.

[11] Amicus AFL-CIO relies on the plurality opinion in *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979), in arguing (Br. 18-19) that a state's expenditure of public funds (there, unemployment benefits) does not come within the traditional labor preemption doctrine. Aside from the substantially different factual situation—here, the State's decision is predicated on unfair labor practice findings and is intended to penalize violations of the NLRA—the views of the plurality of three Justices in that case failed to gain the acceptance of a majority of the Court. The case was decided on the narrow ground of Congress's intent with respect to unemployment compensation as expressed in the legislative histories of the NLRA and the Social Security Act, which were passed within a short time of one another. See *id.* at 540-546 (plurality opinion); *id.* at 546-547 (Brennan, J., concurring in the result); *id.* at 547-551 (Blackmun, J., concurring in the judgment).

> [I]t is not enough to justify the Board's [remedy] to say that [it] would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

Thus, while the Board is free in any case to take whatever measures are required to restore circumstances to what they would have been had the unfair labor practices not been committed (*Phelps Dodge Corp.*, 313 U.S. at 194) and to prohibit the commission of the same or similar unfair labor practices in the future (*NLRB* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-568 (1950)), the Board is not empowered by the scheme devised by Congress to issue an order that, like the Wisconsin debarment statute, operates as a flat penalty for committing a given number of unfair labor practices and that bears no necessary relation to the nature and consequences of the unfair labor practices concerned.

Congress sought in the Act to "minimiz[e] disruption of interstate commerce" by furthering "responsible and stable labor relations." *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 & 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 27 (1962). It would be odd indeed to suppose that Congress intended that the States could set up their own deterrent system of financial penalties for violations of the NLRA when the Act itself "does not prescribe penalties or fines" but rather seeks only "the protection and compensation of employees" (*Republic Steel Corp.*, 311 U.S. at 10). Wisconsin's imposition of a penalty that Congress denied the Board would quite plainly stand

as an obstacle to the achievement of the purposes of the NLRA.

C. The Penalty Imposed By Wisconsin Is Preempted By The National Labor Relations Act

1. As an additional sanction for violations of the NLRA, Wisconsin's debarment statute is preempted by the federal Act under the principles enunciated by this Court time and again (see pages 9-12, *supra*). The Court in *Garmon* declared (359 U.S. at 243-244) that a state law would not be preempted if it addressed conduct that was "a merely peripheral concern of the [NLRA]" or that "touched interests so deeply rooted in local feeling and responsibility" that "compelling congressional direction" would be required for preemption. See also, *e.g.*, *Local 926, Int'l Union of Operating Eng'rs*, 460 U.S. at 676. Neither exception is available to the State here.[12]

a. Far from applying to "merely peripheral" conduct, the Wisconsin law strikes at the heart of the NLRA: actual unfair labor practices as determined by Board orders enforced by courts of appeals. As we have explained (pages 9-12, *supra*), the coordinated remedial scheme developed and applied by an expert federal agency is central to the achievement of Congress's purposes in enacting the NLRA. A welter of state laws, such as already is beginning to

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[12] Because Congress has actually addressed the employer's conduct in the NLRA, these exceptions are not in fact directly applicable here. See *Brown* v. *Hotel & Restaurant Employees Int'l Union Local* 54, No. 83-498 (July 2, 1984), slip op. 10-11; *Garmon*, 359 U.S. at 245. The analysis of federal and state interests is, however, relevant to whether Congress did intend to preempt a particular type of state regulation. *Metropolitan Life Ins. Co.*, slip op. 24 n.27. We will use the "peripheral concern" and "local interest" rubrics here only because they seem a useful way of rebutting the State's contentions.

exist (see NGA Am. Br. n.1), each withdrawing business for varying lengths of time from employers that have committed varying numbers of unfair labor practices anywhere in the country, would obviously disrupt the uniform administration of the Act that Congress sought to achieve, to the detriment both of employers and employees.[13]

Indeed, in considering and rejecting a proposed debarment scheme, Congress recognized that debarment of labor law violators from government contracts must be treated as an integral part of the federal regulatory scheme. A federal contract debarment program for labor law recidivists was proposed as part of the Labor Law Reform Act of 1978. S. 2467, 95th Cong., 2d Sess. The bill's supporters made it clear that such a measure must be confided initially to the discretion of the Board's General Counsel, acting under limits carefully defined by Congress, if it is to effectuate, rather than thwart, federal labor policy:

> Of course, a debarment program cannot and should not be utilized to achieve labor relations ends contrary to those established by Congress. This bill prevents such practices by placing initial control of the remedy in the Labor Board,

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[13] The State argues (Br. 40-44) that the *Garmon* preemption doctrine applies only to prevent conflicting state and federal rules of conduct and to protect the Board's primary jurisdiction to determine the legality of conduct under the NLRA in the first instance. These are of course grounds for preemption under *Garmon*, but not the only ones. It is equally clear that preemption is necessary to prevent states from adding to the federal remedial scheme, regardless of the consistency of their subsantive rules with those of the Act. See pages 9-12, *supra*. None of the cases cited by the State in any sense overrules the application of *Garmon* and *Lockridge* to state-supplied remedies for conduct that violates the Act.

> which has the responsibility of enforcing the unfair labor practice standards already declared in Section 8 of the NLRA.
>
> Under the bill, the General Counsel of the Board may issue a complaint including the recidivism allegation which can lead to debarment. The Committee's intent is that he not include this allegation with respect to minor violations or those where willfulness cannot be proven, or in other circumstances in which debarment would be inappropriate.

S. Rep. 95-628, 95th Cong., 2d Sess. 30 (1978). The report goes on to define "willfulness" and to make clear that only conduct that violates an outstanding Board order is covered by the "debarment sanction" (*id.* at 31).[14] The period of debarment would be adjustable to "effectuate the purposes of the NLRA" (*ibid.*); debarment similarly could be rescinded to protect employees or to further the policies of the Act (*id.* at 32).

The congressional consideration of this bill demonstrates the functional connection between debarment and the operation of the federal labor law scheme. The finely tuned approach suggested by the Committee in order to avoid conflict with the NLRA contrasts sharply with the mechanical Wisconsin law, which takes no account of the willfulness of violations or other circumstances that may render debarment inappropriate and indeed counterproductive to the goals of the Act. That Congress has thus far not enacted a debarment sanction underscores the need for preemption: "to allow the State to grant a remedy

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[14] Accordingly, the enforcement of Board orders—the basic predicate for debarment under Wisconsin's law—would not have been sufficient for debarment under the federal bill. Only if the employer were in contempt of an enforced Board order would the federal sanction have applied.

* * * which has been withheld from the National Labor Relations Board only accentuates the danger of conflict" (*Garmon*, 359 U.S. at 247).[15] Indeed, this conflict is highlighted by the fact that the federal bill was rejected at least in part because the debarment sanction was considered incompatible with the NLRA. As Senators Hatch and Hayakawa stated (S. Rep. 95-628, *supra*, at 68):

> The [debarment] remedy is quite clearly punitive in nature. It constitutes punishment against employers without providing any compensation whatsoever for employees. Ironically, in its zeal to punish employers, the remedy will often result in a significant loss of jobs—occasioned by the loss of government contracts—for the very employees it was designed to protect.

Moreover, the Board already has the power to tailor its remedies to take into account the impact of recidivism on the administration of the NLRA. See, *e.g.*, *J.P. Stevens & Co.* v. *NLRB*, 417 F.2d 533, 538-541 (5th Cir. 1969) (union afforded access to company bulletin boards and to a list of names and addresses of employees; special requirements imposed

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[15] Amici NGA would discount the relevance of Congress's refusal to pass a federal debarment sanction on the ground that it does not help to demonstrate Congress's intent in passing the NLRA (Br. 22 n.14). Congress's actions subsequent to enactment of the NLRA, however, can prove a helpful guide to the difficult determination of the preemptive scope of the Act. See *Brown* v. *Hotel & Restaurant Employees Int'l Union Local 54*, slip op. 15-16; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). While the intent of a subsequent Congress may of course differ from that of an earlier one, Congress's recent rejection of a federal debarment sanction is quite germane to the practical question of whether a state debarment penalty would interfere with the achievement of the goals of the NLRA.

respecting distribution and reading of the Board's notice). The Board may, for example, issue a "broad order" enjoining unlawful conduct directed at parties other than those involved in the particular proceeding where there is a history of repeat violations. See, *e.g.*, *NLRB* v. *Local Union, No. 3, Int'l Bhd of Elec. Workers*, 477 F.2d 260, 268 (2d Cir.), cert. denied, 414 U.S. 1065 (1973). And, as the court of appeals noted (J.S. App. 20 n.7), the Board may seek court enforcement of its order even where compliance has taken place, if, in its judgment, the remedial purposes of the Act so require. See 29 C.F.R. 101.13(b); *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. at 567-568; see also *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944) (Board can go behind settlement agreement to remedy subsequent violations of the Act). Like the bill considered by Congress, the Board's carefully constructed remedies for recidivism demonstrate the delicate balancing necessary to tailor such a remedy to the goals of the Act, balancing that would be wholly frustrated by the Wisconsin law.

b. Nor is the State acting solely with respect to matters of deep local concern. The "local concerns" that may permit a state law to stand in the face of potential conflict with the NLRA are for the most part limited to a circumscribed set of traditional, core interests behind state public welfare and safety statutes and common law. See, *e.g.*, *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983); *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954). While the State undoubtedly has an interest in how it spends its money, the debarment statute does not further any state economic interest. To the contrary, the statute concededly costs the State money by preventing it

from doing business with contractors whose bids provide the most attractive combination of price, quality, and other features.[16]

By contrast, the extent of any legitimate concern that Wisconsin may have for violations of the federal labor Act—a motivating force behind the debarment statute (see pages 12-13, *supra*)—is significantly weaker than its sphere of action in protecting its fisc and citizens. The state law, moreover, is not limited to NLRA violations within Wisconsin. To the contrary, it applies to unfair labor practices occurring anywhere in the United States. Indeed, none of the violations of the Act that formed the predicate for Gould's debarment occurred in Wisconsin.[17] This case is thus a far cry from those involving conduct in violation of state law that took place within the state's own borders. See, *e.g.*, *Belknap, Inc.* v. *Hale*, *supra* (misrepresentation and breach of contract); *Linn* v. *United Plant Guard Workers, Local 114*, *supra* (defamation). There is no need to require "compelling congressional direction" (*Garmon*, 359 U.S.

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[16] The motivation behind Wisconsin's statute suggests another way in which it is incompatible with federal labor policy. The State has acted to further what it perceives to be the interest of employees' organizational rights by boycotting goods produced entirely or in part by labor law violators. Congress, however, has expressly forbidden unions from requiring employers to boycott goods of neutral employers. See § 8(e), 29 U.S.C. 158(e). Surely Congress did not intend to allow the states (presumably at the behest of union advocates) to engage in conduct so similar to the statutorily disfavored secondary boycott.

[17] Moreover, Gould's divisions were responsible for their own labor relations policies (State Br. 13, citing R. 2), and Gould no longer owned the divisions that had committed the unfair labor practices at the time that it was debarred (J.S. App. 7).

at 244) before concluding that Congress did indeed intend to preempt such far-reaching state sanctions.

2. To escape the obvious conclusion that state penalties for unfair labor practices are preempted by the NLRA, the State, supported by amici (NGA Br. 6-12; AFL-CIO Br. 19-22), argues (Br. 19-38) that it is acting as a "market participant" rather than in its regulatory capacity and that as such its actions may not be preempted. In making this argument, the State and amici rely on a line of cases decided under the so-called "dormant" Commerce Clause, addressing the limitations on state activity burdening interstate commerce in areas where Congress has not itself legislated. The argument fails for two reasons. First, Wisconsin is not acting as a market participant as that term has been understood by the Court. Second, even if it were, the dormant Commerce Clause cases are inapplicable here, where Congress has exercised its commerce power in the NLRA.

a. In the few cases in which this Court has applied the market participant doctrine, the state's activities were all designed to "limit[] benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). Thus, in *Reeves*, a state sold cement that it had produced at a plant funded with state taxpayers' dollars only to state residents in times of shortage. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), a state's bounty program for abandoned vehicles favored in-state processors. As the Court explained in *Reeves* (447 U.S. at 442-443 n.16), the state in *Alexandria Scrap* was motivated by the "desire to channel state benefits to the residents of the State supplying them." Similarly, in *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460

U.S. 204 (1983), a municipal ordinance favored municipal residents in construction projects financed in whole or in part by city funds. Finally, in *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), the plurality noted (slip p. 15) that the state had acted "with the permissible state purpose of fostering local industry." [18]

Here, Wisconsin has not acted with the purpose or effect of granting its own residents preferential treatment in the distribution of State funds. Rather, it is using its purchasing power for the purpose and effect of punishing federal labor law violators. To accomplish this result, the State refuses to purchase goods from vendors such as Gould regardless of whether they are in-state or out-of-state and even when they have made the lowest bid or are otherwise the most attractive. This conduct bears little resemblance to that of a private actor in the marketplace, for it furthers no economic interest of the State or its residents.[19] Once the State goes beyond conduct

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[18] The plurality in *South-Central Timber* concluded (slip op. 14-17), however, that the state did not act as a market participant because it imposed "downstream" restrictions on timber processing by its customers. Similarly, here Wisconsin has imposed an "upstream" restriction that none of its direct suppliers may themselves have obtained supplies (as to the goods sold to the State) from Gould (see pages 2, 14, *supra*). This factor alone is sufficient to take Wisconsin's conduct outside the market participant doctrine.

[19] The State does not contend, for example, that it is more expensive or disruptive to deal with labor law violators. Cf. *Amalgamated Transit Union, Division 819* v. *Byrne*, 568 F.2d 1025, 1030 (3d Cir. 1977) (en banc) (State's refusal to subsidize transportation firms that agreed to an uncapped cost-of-living clause in a collective bargaining agreement furthered the State's interest in conserving scarce financial resources).

that would be normal or economically rational for a private party in the market to achieve other goals, it is no longer acting as a market participant.[20] By whatever method it has chosen, it is regulating.

b. Even if Wisconsin were acting as a market participant as that term is used in the dormant Commerce Clause cases, that consideration is not germane to whether its actions are preempted under the NLRA. The Commerce Clause is a "self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce." *South-Central Timber*, slip op. 5. At issue in every one of the Court's market participant cases was this self-executing, "dormant" aspect of the Commerce Clause. As the Court stated in *Alexander Scrap* (426 U.S. at 810 (footnotes omitted; emphasis added)), "[n]othing in the purposes animating the Commerce Clause prohibits a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." The Court did not decide (*id.* at 810 n.19) "whether Congress could prohibit the

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[20] As the State appears to recognize (Br. 30), a corporation's management may not further its own social policies at the economic expense of its shareholders. See, *e.g.*, *CFTC* v. *Weintraub*, No. 84-261 (Apr. 29, 1985), slip op. 5. A state, by contrast, may use its coercive power to tax its citizens in order to finance economically inefficient policies. Thus, contrary to the State's argument (Br. 29-30), Wisconsin is not merely acting as General Motors would, and it is, for that reason among others, not entitled to be excepted from the preemptive effect of the NLRA. Moreover, even if Wisconsin could in this manner permissibly further its local interest in compliance with the labor laws within its borders, the law here sweeps much more broadly, reaching violations occurring anywhere in the United States.

type of selective participation in the market" present in that case.

Here, Congress *has* acted pursuant to its commerce power in enacting the NLRA. Its intent, as the Court has repeatedly recognized (see pages 9-12, *supra*), was to preempt the field of remedies for unfair labor practices, and thereby to prohibit the states from acting to impose penalties for such conduct regardless of the form of those sanctions. There is nothing to suggest that Congress intended states to be able to penalize labor law violators through the use of the public purse, when the effect is to undermine the remedial scheme administered by the NLRB just as if they had acted by more traditional routes. Indeed, Congress's own rejection of a debarment sanction (see pages 19-21, *supra*) suggests precisely the opposite.

In *United Building & Constr. Trades Council* v. *Mayor of Camden*, No. 81-2110 (Feb. 21, 1984), slip op. 10, the Court "decline[d] to transfer mechanically into [the Privileges and Immunities Clause] context [the market participant analysis fashioned to fit the Commerce Clause." Just as the Privileges and Immunities Clause "imposes a direct restraint on state action" (*id.* at 11) regardless of the form of that action, so does the NLRA, through the Supremacy Clause. That the dormant Commerce Clause does not do so is simply irrelevant.

Amici NGA et al. make two arguments (Br. 6-12) to counter this reasoning. First, they attempt to distinguish between Congress's power to regulate the states and its intent to preempt state action. This distinction lacks substance. If Congress has the power expressly to prevent the states from enacting statutes such as Wisconsin's, it certainly may exercise that power through its implicit intent to preempt those

statutes. The argument therefore collapses into NGA's second contention, which is that Congress lacks the authority under the Commerce Clause to set limits on a state's conduct as a market participant. Amici assert that the dormant Commerce Clause cases stand for the proposition that Congress has no power under the Commerce Clause to legislate with respect to a state's market participation except insofar as it has legislated in a like manner with respect to private persons in the market. The State appears to make a similar agument (Br. 29-30).

This argument fails for several reasons. First, the Court has expressly stated that it was not addressing the applicability of the market participant doctrine to circumstances (like the present) where Congress has exercised its legislative power (see page 26, *supra*). Second, the "Commerce Clause is a grant of authority to Congress, not a restriction on the authority of that body." *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. at 213. It therefore does not follow from the limitations on the reach of the dormant Commerce Clause that Congress lacks the power to regulate states' market conduct. At this late date, it is quite far-fetched to suggest that the NLRA is unconstitutional insofar as it reaches the states qua market participants. See generally *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding constitutionality of the NLRA under the Commerce Clause).

Indeed, the State and amici appear to admit as much; they argue primarily that Congress cannot regulate state market participation to any greater degree than it regulates private market conduct. But certainly nothing in the Commerce Clause itself requires such identical treatment of public and private

entities. The Supremacy Clause makes the policy of Congress the policy of the states as well. Accordingly, as amicus AFL-CIO properly concedes (Br. 12-13), this Court has recognized that governments and private actors are not similarly situated—that some conduct, for example, may be protected under the NLRA "'against state, but not employer interference.'" *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 145 n.6 (1976) (quoting Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1346 (1972) (footnote omitted)). This is especially true here, where the State is not acting as any rational private actor could or would (see pages 22-26 & note 20, *supra*). Whatever the force in other circumstances of amici's argument that Congress cannot regulate state market participation to any greater degree than it addresses the participation of private persons, it is largely inapposite here, where the state's rule serves only a regulatory rather than a business purpose and similar private conduct accordingly would be wholly aberrational.[21] Certainly Congress need not have addressed the idiosyncratic private ~~action~~ actor that boycotts labor law recidivists in order to be understood to have

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[21] The regulatory nature of the State's rule also wholly distinguishes the question here from the Tenth Amendment concerns that divided the Court in *Garcia* v. *San Antonio Metro. Transit Authority*, No. 82-1913 (Feb. 19, 1985), and its predecessor cases. In contrast to the congressionally prescribed rules for state employment at issue in those cases, the present case raises only a traditional preemption issue—whether state-imposed sanctions regulating private conduct are compatible with a federal scheme regulating the same private conduct. Our position here, therefore, is entirely consistent with the views expressed by all Members of the Court in *Garcia*.

intended to preempt state boycotts which so plainly hobble Congress's purpose in the NLRA—promote commerce under a remedial scheme developed and applied solely by the Board.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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I authorize the filing of this brief.

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SEPTEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461831 20009